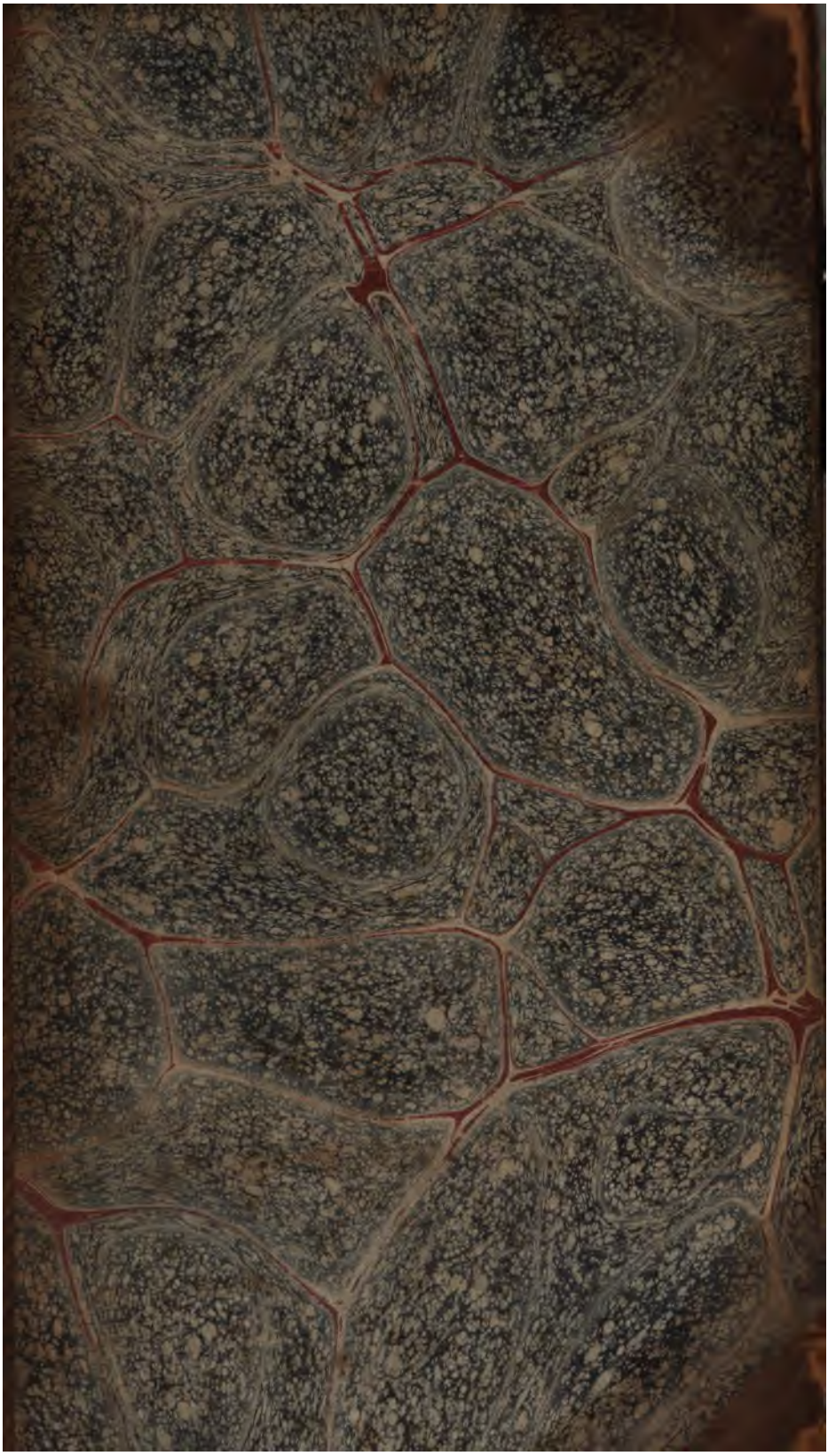

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LETTER

TO THE

RIGHT HON. ROBERT PEEL,

ON

THE SUBJECT OF SOME OF THE LEGAL REFORMS PROPOSED BY MR. BROUGHAM.

BY

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A

LETTER

TO THE

RIGHT HONOURABLE ROBERT PEEL.

SIR,

EVEN if your official station were not peculiarly connected with the administration of the law, I trust I need not apologise for addressing a few remarks on legal reforms to you, who have already on sound principles improved one branch of the judicial administration. I confess, sir, I should not venture to offer the following observations, if I had not some hopes, that the views which I have taken of the spirit in which all such reforms should be considered, and the extent to which they should be pushed, were likely not to be in discordance with your views and principles on this subject and the spirit by which your general political conduct is governed. If I did not feel confidence in your being neither a speculative reformer nor an enemy to improvement, I could not hope that my humble views were worth laying before you.

I believe, sir, that you will agree with me, that "a disposition to preserve, and an ability to improve, are the standard of a statesman; that every thing else is vulgar in the conception, perilous in the execution *." To draw the line between practical reform of existing grievances and mere experimental innovation, is the task which devolves on the constitutional statesman, not less with respect to reforms of the law than to other alterations of the constitution. The public have, undoubtedly, a right to ask for a reformation of what is mischievous in our legal institutions, but it is the business of the statesman carefully to preserve every stone of the edifice that is not proved to be injurious. You know well, sir, how much easier it is to destroy than to construct: for every new experiment introduced, some old institution sanctioned by habit and well known to the people is displaced. If the new plan does not succeed in practice, it is not always easy to recur to the old. Nothing shakes public confidence so much, and is so practically inconvenient, as fluctuation and uncertainty in the legal institutions. Bad laws are, I believe, less mischievous than laws subject to capricious change. "It is the first care of a reformer to prevent any further reformation †." Schemes

* Burke's Reflections, &c. p. 233.

† Gibbon, Dec. and Fall, &c. vol. viii. p. 45.

that sound well in description, or make a figure on paper, which might be well deserving of the consideration of the framers of a new state, become utterly inapplicable and undeserving of attention in an old country, where old and long-rooted establishments must be torn up or defaced to make way for them. In such a country as ours, "the true politician always considers how he shall make the most of the *existing* materials of his country." The principle, therefore, and the only principle on which in my humble opinion legal reforms can in England be safely conducted, is that already recognised by your efforts, of inquiring into and removing abuses found to be actually felt and practically injurious to the public. The language often held by eminent statesmen whom you and the country at large respect, when other reforms have been projected, is that which I conceive statesmen should hold on the question of reform of the law. "Make out a case of existing abuse, show an evil felt in practice, prove that it proceeds from the system, and we will join in inquiring into the safest means for its removal." If you stop short of this principle, the public may justly complain; if you go a step beyond it, you admit the principles of theoretical harmony, of change for the sake of experiment; there is then no length which you are not bound in

consistency to proceed. You have conceded the principle; you cannot afterwards withhold the details.

It may, sir, seem superfluous to insist on a principle, which among rational men, though of different opinions on many matters, can scarcely be denied to be sound and wise. But, sir, in the present day, there is a class, who regard all the conservative principles of politicians as foolish, who systematically prefer all that is untried to all that is tried, who, in their presumptuous self-sufficiency, reverse every received maxim of political wisdom, consider experience as the worst of guides, regard precedent as a thing only to be overruled, look upon history as a school of error, the past as all darkness, and the upstart projects of some schemers of the present age as the only models of law and legislation which this country, after destroying its institutions, ought instantly to try in their place. Diligently as some of these persons have endeavoured, through the press, to persuade the people of this country that their laws are altogether worthless, that any reform short of sweeping destruction is a mockery, and that the interests of the learned and respectable body who study and profess the law, and produce its pure and enlightened judges, are directly in opposition to the good of the public, it is pleasing to see how little success is achieved by their sophistries. The people,

though not blind to the imperfections in parts of our laws, respect and esteem them in the main. They still revere the excellencies of a system which, with all its blemishes, produces far more pure administration, far more security of persons and property, far more equal protection to all classes, than any now existing in any considerable state in Europe. While every grievance, widely and severely felt in the country, finds its voice by petitions in the House of Commons, I have heard of no petitions against the state of the laws. Mr. Bentham himself (certainly a most unfriendly critic) is constrained to admit, as to our common law and its rules, which are the theme of such frequent abuse from those who know nothing of either —"Traverse the whole continent of Europe, ransack all the libraries belonging to the jurisprudential systems of the several political states, add the contents together, you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement, in a word, all points considered, in instructiveness, to that which may be seen to be afforded by the collection of English Reports of Adjudged Cases; on adding to them the abridgments and treatises, by which a sort of order (such as it is) has been given to their contents—nor to the composition of a complete body of law (in which, saving the requi-

site allowance to be made for human weakness, every imaginable case shall be provided for, and provided for in the best manner) is any thing at present wanting but an arranging hand*." The very fact of the great increase of resort to our courts by civil suitors affords in itself a negative to those exaggerated statements, which would insinuate that their expense and slowness amount to a denial of justice. If Chancery suitors are ruined by decrees in their favour (as we are loudly told), how happens it that a Vice-Chancellor is of necessity appointed, and that three Equity Judges, with all their labour, cannot satisfy the demands of the suitors for decrees on their rights? If debts are not worth recovering, as we are often told, by reason of the costs incurred; how is it that the Chief Justices in London and Middlesex, and the twelve Judges at the assizes, are consuming their strength and their intellects, in struggling ineffectually to despatch the mass of claims which plaintiffs are every day in greater numbers pressing before them? How is it that parties still persist in going before courts in preference to compromising their disputes, or resorting to arbitrators?

But, sir, how are our laws regarded abroad? While we are told that they are a compound

* Papers on Codification.

of antiquated abuses and mischievous oppressions, foreigners are diligently studying them, and introducing our systems into other countries. A liberal and enlightened judge from France * not long ago visited this country for the purpose of accurately investigating in detail the systems of our criminal and civil administration of justice, and returned, as he has himself recorded, highly impressed with the striking advantages attending their practical operation, and desirous to improve the laws of his own country by imitating ours in many important particulars. Our American brethren, with all their love of cheapness and simplicity, not only adhered to the English common law, when, with exasperated feelings, they threw off her government, but they have since declined the pressing offer of a code from a great code framer, and retain the English system with an attachment and a sense of its merits confirmed by long experience. A liberal and well informed writer of that country thus speaks of English law †: "The principles of the common law are the basis of all our institutions. They are the common soil, which may be cultivated in different modes, but to which we are indebted for whatever harvest of law and justice our industry may reap. The jurisprudence of

* Mons. Cottu. I regret I have not his work by me.

† See North American Review, No. 49. October, 1825.

every nation with whom we or our ancestors have had intercourse has been laid under contribution, and our laws, like our language, have flowed from a thousand springs. Like our language, too, they are adapted to our present character and wants, and admit of indefinite expansion and improvement . . . . The flexibility of the common law is a quality of vast importance to us as a young and improving nation. Our jurisprudence is a philosophical science, not derived merely from an abstract consideration of the nature of the human mind, but adapting the rules of action to the precise character, situation, and wants of those whom it governs."

Sir, these are not arguments to show that our law is perfect—I am far from thinking it so—but they do refute the vulgar exaggeration of its defects: they do show, that it is not useless for the ends of justice—that, while foreigners admire and imitate it, it is not held in disgust and disesteem in this country—that its bitterest enemies cannot deny its great merits—that the public throng and place confidence in the courts—that they desire no sweeping alterations or abolitions. The principle, therefore, sir, of reformation solely of the incidental grievances which parts of our law present, is not only the sole safe principle, but it is a principle which (however vague theorists may

decry it) will, I am convinced, be satisfactory to the public—nay, I firmly believe, the only one which would not shock, dissatisfy, and alarm every important class in the country.

Having ventured thus, sir (I trust not with undue boldness), to advert to what seems to me the only constitutional principle to be adhered to in partially reforming the English laws, I will proceed (bearing in mind the principle) to notice a few of the topics suggested by Mr. Brougham. I shall not say any thing on the administration of justice in India, which must, I apprehend, naturally be a subject for separate inquiry; nor of the system of magistracy, and the licensing of public houses, which occupy one seventh part of Mr. Brougham's address; nor of the detached points, as to revocation of wills, the construction of words in wills and deeds, the distinction between patent and latent ambiguities, the conversion of trusts into legal estates; since these isolated topics are so inseparably connected with the other parts of our system of real property and judicial construction, that it is in vain to consider them detached from the systems to which they belong. They in fact belong to the system of real property, which Mr. Brougham expressly excluded from his motion.

The first topic to which I shall allude ap-

pears to be a real grievance deserving of serious inquiry.

The increase of civil suits which has taken place of late years has rendered it indispensable, by every means, to render the superior courts more adequate than they now are for their speedy despatch. In this part of Mr. Brougham's speech I entirely agree. Looking at the overwhelming business of the court of King's Bench, and the comparative inactivity of the courts of Common Pleas and Exchequer, it is obvious that defects must somewhere exist in the constitution of these courts, which prevent their being efficient for despatching the business of the country. The desirable end which has been aimed at for centuries, and which has occasioned the ingenious devices which have broken down the peculiar forms, separating the jurisdictions of the three courts, has been to render them all available to the public, for any kind of suits, with some slight exceptions. That in this competition, even if made open and fair, all the courts should be equally successful in attracting business, I am not disposed to hope. But that the present enormous disproportion is capable of being in a great degree remedied, I think admits of no doubt. Mr. Brougham alludes generally to this disproportion: the fact appears by the parliamentary returns, that in the seven years, 1820 to 1826,

Disproportion of causes tried in the three courts.

the amount of causes decided in the Court of King's Bench was 13,379—in the Common Pleas only 3902, or not one third of the amount in the King's Bench;—while in the Exchequer, the causes of all descriptions, equity, common law, and crown cases, were only 1346, about one tenth of the amount in the King's Bench.

Before inquiring into the cause of this disparity, I will state what I believe to be the chief technical causes which have lately contributed to the increase of the King's Bench business. First among these causes, I apprehend, must be reckoned the late act called the Writ of Error Act*. Though this wise act has, I believe, done more to stop vexatious and dilatory litigation than any other act of late times, yet it has, with other causes, contributed to the swelling of the list of the King's Bench Nisi Prius causes. Before this act, the evasive debtor, in order to thrust off the day of payment, first had recourse to the chicane of sham pleas, then suffered judgment by default, and then, in order to avoid an execution, brought a writ of error into the Exchequer Chamber, and afterwards perhaps into the House of Lords. On this writ of error (except in certain cases) no bail was required from the defendant, to secure to the plaintiff the debt and costs. The

Causes of increased business in the K. B.

* 6 Geo. IV. c. 96.

act which you carried through the House of Commons, requiring bail to be given *in all cases* of writs of error, effectually defeated these dilatory tactics; since bail in error, not having (like bail in the action) the alternative of discharging themselves by surrendering their principal, can very rarely be obtained by defendants of that class who refuse just debts. Since the passing of this act, a great part of the delay and expense in the action on a bond by a Welsh widow mentioned by Mr. Brougham, could not have occurred. It became necessary therefore for defendants to change their manœuvres; and accordingly, to attain the utmost possible delay, they now abide by their plea, and go to trial instead of putting in sham pleas, and then letting judgment pass by default. Hence the cause papers at the sittings and assizes are now loaded with trivial and defenceless cases, in which formerly judgment was suffered by default, and a writ of error brought. These causes pass off from the paper by verdicts taken by consent, or by the cause being disposed of as undefended. But the advantage derived from the Writ of Error Act is, that here the defendant is now at check-mate in his manœuvres for delay. Judgment and execution follow in the four first days of the next term following the trial; and if, indeed, the defendant has delayed the trial at Nisi Prius by

preventing the cause being earlier disposed of as undefended, the judge gives the plaintiff a judgment, *as of the preceding term*, which entitles him to execution immediately. Thus although the Writ of Error Act has been attended with the smaller inconvenience of obliging plaintiffs to try their causes, instead of taking judgment by default, it has, on the other hand, given to them the much preponderating advantage of a judgment and final execution, immediately after the trial, instead of a long delay for a year or fifteen months, and a vast expense by one or perhaps two proceedings in error.

The increase of the causes at Nisi Prius, by the effect of the Writ of Error Act, it is to be observed, is confined to small cases, generally undefended, which the Lord Chief Justice, by a wise regulation, and with indefatigable zeal, sweeps off to the number of one hundred or more in a single day; appointing all cases of this description to be taken at fixed times, in preference to the heavier business of the court. Besides, sir, if this Act has driven business into one channel, it has necessarily subtracted it from another; and accordingly as the small cases tried at the sittings have increased, the writs of inquiry executed before the sheriff on judgments by default, and the references to the master to assess damages on bills of exchange, have proportionably diminished.

Mr. Brougham still complains of the evils of sham-pleading. But, sir, on inquiry, he might have discovered that these odious weapons in litigious hostility are, like writs of error, now growing rusty in the legal armoury; their utility being almost entirely destroyed by the discouragement of the courts and the Writ of Error Act. One eminent attorney informs me that scarcely one in a term appears in the multitude of cases in his office. A considerable special pleader, I find, had two such pleas in two years. Many others refuse to draw them. In short, sir, when the courts suppressed all such pleas of this kind as embarrassed the plaintiff by requiring special replications and different modes of trial, a great check was given to the odious system*. The courts, indeed, have latterly felt a difficulty in doing more for the object; since, as every individual has an undoubted right to shape his defence as he pleases, and the constitution requires the truth of the defence to be decided only by a jury, and not by affidavit, it is perhaps an excess of jurisdiction for the courts to call upon the defendant to swear to the truth of his plea. In a case in 1823, the Court of King's Bench said,

* This was effected by the cases of Blewitt v. Marsden, 10 East Rep. 237; Thomas v. Vandermoolen, 2 Barn. and Ald. Rep. 197; Richley v. Poone, 1 Barn. and Cres. 286: but see Merrington v. Beckett, 2 Barn. and Cres. 81.

"it would be going too far to treat the plea as a nullity unless the defendant verifies it on oath," and that they would endeavour to find some other means to prevent the practice. Sir, that means has been found in the effect produced by the Writ of Error Act, for as sham pleas are almost unavailing, unless followed up by suffering judgment by default, and bringing a writ of error (a defendant scarcely ever pleads a sham plea for the purpose of going to trial), these pleas are now almost entirely disused, since the Writ of Error Act has done away with the judgment by default, and driven defendants to the desperate resource of a brief delay by going to trial.

I would beg here, sir, to suggest that it might materially discourage defendants going to trial for delay, and might drive them to a compromise or payment before trial, if execution could be made to follow more immediately after the trial came. At present it is necessary to wait till the next term, as the defendant has a right to move for a new trial, or in arrest of judgment in the four first days of the term. This delay is always considerable, and after the summer assizes is sometimes four months. Now in ordinary actions for common money debts, where the case is undefended and the record simple, there can be no ground for any motion

in term time to impede judgment and execution. In these cases, I suggest that the judge at the trial should have the discretion (as is the case in the Court of Common Pleas at Lancaster), on the application of the counsel, of allowing judgment to be signed *immediately*, as of the term preceding, and execution to be had forthwith. If the defendant's counsel can lay before the judge, or if the judge discovers a ground for any motion in arrest of judgment, &c. then of course the judge would refuse the plaintiff's application. I believe this alteration would prevent many dilatory defendants incurring the needless expense of trial, which would thus afford them no material delay.

But, sir, there is another cause besides the effect of the Writ of Error Act which has materially contributed of late to the amount of small causes in the King's Bench paper. This is, the distrust and hesitation felt by attorneys and plaintiffs to compromising by taking a *cognovit actionem* or a warrant of attorney to confess judgment, in consequence of the operation on those securities of the New Bankrupt Act, 6 Geo. IV. c. 16. s. 108. That section, which is in some degree ambiguous in its language, has been supposed in the profession (and particularly among attorneys and solicitors) to have the effect of overturning a

judgment and execution (where the judgment is by default or confession) in case of a bankruptcy of the debtor happening at any distance of time after the execution—so that it has become doubtful whether the creditor, seizing, and selling, and spending the money produced by the execution for his just debt, might not at any time be obliged to refund to the assignees of the debtor becoming bankrupt afterwards. The cases decided by the Court of King's Bench * have indeed adopted the narrower and sounder construction, that, in order to give the assignees the priority, the bankruptcy must happen at least before the sale under the execution, though after the seizure. But still, even under this view of the clause, the plaintiff, having a judgment by verdict on a trial, is in a better situation than the plaintiff having merely a judgment by default or confession, since, in the former case, the plaintiff is safe if he merely *seizes* the goods of his debtor before the bankruptcy happens, whereas, in the latter, he does not appear to be secure unless he both *seizes and sells* before the bankruptcy. This *actual* inferiority of the security by judgment by default, added to the immense *supposed*

* Taylor *v.* Taylor, 5 Barn. and Cres. Wymer *v.* Kemble, 6 Barn. and Cres.

inferiority arising from the above popular construction of the Bankrupt Act, has given a great check to the practice of compromising on cognovits and warrants of attorney: plaintiffs are afraid of the security; they say, "we must have a verdict in order to be sure,"—and hence they drive defendants to a trial where they formerly compromised on a judgment by default. The intention of the above clause was undoubtedly salutary, and it was borrowed from an Irish statute, the 11 and 12 Geo. III. c. 8. s. 5, for the purpose of checking the great abuses of warrants of attorney, by creditors keeping these secret securities hanging over the heads of their debtors, ready to sweep away their whole effects, on insolvency, to the exclusion of all others who had given them credit on the ground of their apparent property. Perhaps the useful check given to this mischievous practice in some degree counterbalances the inconvenience of adding trifling causes to the Judges' paper at the sittings and assizes, and increasing the costs ultimately falling on the Defendant.

I believe, sir, that the above are the two main technical causes which, independently of the general increase of population, of trade, of contracts, and projects of all sorts, have tended of late to the great increase of the cases tried at

Nisi Prius—an increase which has, I believe, been almost entirely confined to small actions for debts, and which I believe to be attended by a proportionate diminution of business in other channels.

I will now advert to what I believe to be some of the main causes of the disproportion in the business of the three Courts of King's Bench, Common Pleas, and Exchequer.

First, and in my humble opinion paramount among the causes of the comparatively small business in the Common Pleas, is a cause noticed by Mr. Brougham—the inequality in respect of fees of office in the several Courts. The fees are somewhat higher in amount in the Common Pleas than in the King's Bench, and, what is more essential, they are paid on entering the Declaration at the Prothonotary's in the very commencement of the proceedings. 8d. per folio is then paid. Declarations vary in length from four or five folios to many hundreds in some cases. The average may perhaps be stated as twenty or thirty folios, requiring accordingly a fee of 13s. 4d. or £1. to be paid immediately, which, though a small amount, is a matter of importance to many attorneys, who prosecute trivial actions for clients who cannot advance money. It is by no means uncommon for the fees on the declaration to amount to £2. £3. or £4. In the King's Bench no payments

of this kind are required at first; they are only paid when the cause has arrived at the stage of passing the Record and proceeding to trial: consequently if the cause is compromised before the trial is at hand (which happens probably in at least nine causes out of ten) there is a clear saving of all the money thus paid for fees of office—and even if the cause go to trial, there is at least some weeks or months delay in paying the fees. Is it, sir, matter of wonder that, even if other points were equal between the two Courts, the cheaper price and credit of the King's Bench should be more delectable to attorneys and suitors than the dear price and ready money of the offices of the Common Pleas? But other points are far from being equal. The rates as to taxation of costs are more fixed and settled in the King's Bench than in the Common Pleas. There is also an additional cheapness in the King's Bench, in the fees paid on signing judgment; besides which, in the Common Pleas, the fees on entering are paid twice where the Declaration is of one term and the issue is of another, while in the King's Bench there is only one payment. Add to this, the suits of the three Counties Palatine, Chester, Durham, and Lancaster (three of the most important counties in the kingdom, and Lancaster alone producing generally 230 or 240 civil causes at every assizes) are almost

entirely excluded from the Common Pleas by the following circumstance. All causes in the Common Pleas commenced by original writ from Chancery; and though the suit is generally in fact commenced by process of capias, yet this presupposes an original writ issued, and in case a Writ of Error is brought for want of an original, it is necessary afterwards to get one issued, according to lawyers' phrase, *nunc pro tunc*. But then, by reason of the separate jurisdictions still attached to the Counties Palatine, the King's original writ out of Chancery cannot issue unto them; accordingly, if a suit in which the issue is laid in a County Palatine is commenced in the Common Pleas, the defendant may suffer judgment by default, and overturn all the proceedings by a Writ of Error, assigning for error the want of an original writ, and such a writ cannot afterwards be obtained. By this cause alone it is, I imagine, not too much to say, that many score, and, perhaps, some hundred causes in a year are excluded from the Court of Common Pleas and taken into the King's Bench, in which all points reserved, all the special verdicts, motions for new trials arising out of them at the assizes, are consequently discussed and decided.

Another inconvenience in the Common Pleas arises from the return days of writs. As all proceedings here are by original writ, parties

can only make their writs returnable on the general return days, of which there are four in a term, except Easter Term, wherein there are five. In the King's Bench parties may proceed by common process and make their process returnable on any day they please in Term, which much facilitates the proceedings. I am inclined also to think, that the separate admissions of attorneys as practisers in the several Courts also have an influence in swelling the causes in the King's Bench. Separate admission fees are paid by the attorneys on admission in each Court. No attorney can practise in a Court in which he is not admitted. A young attorney, commonly on commencing business, is only admitted in one Court, and that one Court necessarily must be the King's Bench, as the superior Court of the kingdom, and the Court in which alone he can be engaged in criminal business of various descriptions. If he practises in the Common Pleas it must be in the name of another attorney; and why should he do this, when he can try his causes in his own name in the King's Bench? When a man has the choice of courts, a very slight motive indeed determines him to bring his action in one or the other. A favourite counsel, a reliance on a particular judge, the mere locality of the court helps to gain it a preference or a disfavour. I know equity barristers, who, when instructed to pre-

pare a bill either in the Exchequer or the court of Chancery, avoid preparing it in the Exchequer, simply because that court sits in vacation in Gray's Inn, which is inconvenient for equity lawyers practising in the Chancery courts in Lincoln's Inn. I trust, sir, that from the above statements you will see, that in order to place the Common Pleas on any thing like a footing of fair competition for business with the King's Bench, it is first necessary to equalize the official fees both in amount and in time of payment—to establish one uniform rule for both courts as to taxation of costs—to provide for an original writ running into the Counties Palatine—and in some way to make a provision for an attorney being admitted at once of all the three courts. In any arrangements of this sort, I believe, sir, that the fair vested interests of any parties who may suffer by the alterations will be sure of your attention and protection. I am very much inclined to think, that if these measures were adopted, the barriers that now exclude the stream of lawsuits from the Common Pleas would soon be crumbled down, and that the fair share of the general current of business would find its way into that court. The attorneys and practical men with whom I have conversed express themselves desirous of resorting to the court, in order to get a speedier decision than can be obtained in the King's Bench, but for the causes which deter them.

And this brings me to say a word on the other causes alluded to by Mr. Brougham. 1st. With all the respect that I in common with the legal profession feel for the truly honourable and learned judges administering justice in this court, I believe it would be a misstatement that could impose on no one to say, that the profession, the suitors, or the public, feel the same confidence in their decisions which they give to those of the judges of the King's Bench. The constant occupation of the latter on business of a more varied and difficult character is doubtless of itself a great means of improving all the faculties which constitute judicial capacity. It is, I believe, with judges as with advocates. The more business they despatch, the better they despatch it; and the employment not only improves capacity but increases reputation and public confidence. Suitors are eager to flock where others repair; and the mere circumstance of a court being only half employed and half attended of itself checks their approaches. Remove the palpable obstacles above noticed, and I believe the reputation of this court would increase along with its business.

2d. It remains to say a word on the question put forward by Mr. Brougham, Whether the monopoly enjoyed in the practice of this court by the sergeants at law should be thrown open to the professors of the law at large? The

causes above noticed I believe to be the most influential in reducing the business of this court. Its peculiar system as to counsel may also have some effect, and I believe it has. You, sir, will I know feel all the consideration that is due to the interests of the respectable and learned body of advocates who have joined that court under the sanction of its existing constitution. Their interests and those of the public (if at all at variance) may be found not irreconcilable. No measure that has a rash and undue tendency to shake the consideration and station of a prominent class of the legal body, in whose general consideration and honourable station the public are deeply interested (since the purity and independence of the Bench are affected by this cause), will ever, I am sure, sir, meet with your sanction. I reckon nothing in this instance of the argument (often applicable) that all monopolies repress energy and tend to stupify talent. The Common Pleas Bar is, and always has been, occupied by many men of talent; some eminent leaders on their circuits, and who appear occasionally in the other courts with effect; and certainly not by any one man, whose zeal, and activity, and alacrity of speech does not negative all ideas of the quiescent effects of monopoly. I need not name the present Lord Chancellor, the Chief Justice of the Common Pleas, the Chief Baron of Scotland, and

three of the most eminent of our present judges as doing high honour to this court. I believe, sir, that according to its present constitution, the court always has been, and is always likely to be, well supplied with advocates qualified as leaders at Nisi Prius. It is the ordinary step of barristers desirous of leading business, of addressing juries, and feeling a capacity for it, to obtain the degree of sergeant from the Lord Chancellor. At the assizes and sittings no inconvenience is felt in the court, since the business of the junior barristers, who prepare the pleadings, advise on the law and evidence of the case, is here allowed to be done by barristers practising in the King's Bench. One great advantage to the suitor in the King's Bench is, that those same barristers, who have advised on and directed the cause from its commencement, and investigated the law bearing upon it with a care and industry which leaders (even when qualified) cannot bestow, are heard in the King's Bench to argue the legal questions reserved at the trial, arising on the record, or in any way springing from the suit. In the Common Pleas the sergeants who lead the cause can alone be heard before the court in term time, while the junior barrister, on whom the suitors and attorneys often mainly depend, with whom they have frequent communication, and who possesses the most intimate knowledge of the cause,

is obliged to sit silent, without offering his valuable suggestions.

The barrister prepares a demurrer on his own views of the law, or draws up a special case or verdict with minute attention to the facts of the case; but having done this in his chambers, he is obliged to leave the important question solely to be argued in court by a sergeant. Again, if a suit in the Common Pleas is tried at the assizes, it often happens that the cause is entirely conducted by advocates not belonging to that court; and consequently, when a new trial is to be moved or a special case reserved, to be argued before the Common Pleas in term time, the learned sergeants who were strangers to the case at the assizes must alone be employed, and the counsel who conducted the nisi prius trial cannot be heard. I believe, sir, that in these respects the system of the Common Pleas is felt as a disadvantage by suitors. Whether this would be entirely removed by a provision, allowing the junior barrister engaged in any cause to follow the learned sergeant in argument before the court, or whether some arrangement is necessary (as it probably may be found) for opening all the courts equally to all advocates, are questions which deserve serious inquiry; in which, while the interests of the suitors are considered, those of the legal profession both in and out of the

Common Pleas should not, I submit, be overlooked.

Though this measure should be adopted, I believe it would be far from placing the courts on an equality in point either of character or of business. As long as the court of King's Bench is a court of appeal from the court of Common Pleas and other courts, and has an exclusive jurisdiction in criminal matters, and a general superintendence by *mandamus* and otherwise over all the courts in the kingdom, it will not only retain a superior consideration as well as rank, but a very large share of important and profitable business beyond the other courts. This will necessarily attract to it and form in it the most eminent leaders of the bar, and the court will probably continue to enjoy a superior degree of confidence and reputation.

With respect to the court of Exchequer, though actions of every kind at common law and ordinary suits in equity, as well as informations on the part of the crown for offences against revenue laws, are all within the cope of this court, I have stated above from the returns, that in the last seven years there have been only about one-tenth of the number of causes decided here which are disposed of in the King's Bench. I do not now say any thing of the equity side of this court; but looking to the common law side of the court, there is one obvious cause which probably prevents a mass of business from flowing into

this court. While there are above 8000 practising attorneys in London and country taking out certificates, the practice of the Exchequer is solely confined, as you are aware, to the four sworn attorneys and sixteen clerks in court, of this court. I have now before me a petition to the House of Commons, prepared and signed by 170 of the most eminent attorneys and solicitors in London, praying that this court may be opened to them, on reasonable arrangements being made for securing the interest of the present practitioners. Most of the attorneys of the Exchequer are agents for attorneys in the country. To these latter it is indifferent whether their London agent bring their suits in the Exchequer or elsewhere, the agency fee being the same; and I believe on an inquiry it would be found, that according to the system of costs in the Exchequer, there are considerable advantages to the country attorneys in sending their suits thither. But no attorney in London of course ever thinks of employing an agent to sue for him in the Exchequer on a division of fees, when he may obtain the whole profits of the suit by commencing it in another court, of which he is himself an attorney. I believe, sir, that this is one of the main causes of the desertion of this court, which limits the sittings of the learned barons, often from ten o'clock till half past ten. I believe the solicitors and suitors are not much deterred by the fact of seeing various kinds of business

despatched in this court, which Mr. Brougham thinks makes them suppose none can be done well. The public are certainly apt to judge thus sometimes with respect to individuals; but as the judges of this court are generally taken partly from the common law, and partly from the equity advocates, and as the chief baron is generally an equity lawyer, the court is surely fairly competent to both descriptions of business. When the abovementioned monopoly is got rid of on fair terms, when the fees and taxation of costs are assimilated to the other courts, I have little doubt that this court will receive a large accession of business.

In order to complete the fair equality of the courts, it seems a matter of extreme consequence, as well as a means of preventing vexatious and expensive proceedings, that the rules and system of the practice of the three courts should be assimilated in many points in which they unnecessarily differ. Why should the number of days that a defendant has to plead be reckoned inclusively in one court and exclusively in another? why should the same matter, which is disposed of at first by a rule absolute at once in one court, be twice discussed on a rule *nisi*, at double expense, in the other? why should the rules as to changing the venue and proceeding against attorneys in the three courts be different? These discrepancies are evils, since they perplex at-

torneys and create an inequality in costs in the several courts. I am happy to hear that the subject is already under the consideration of the learned judges of the three courts, who have the means of framing general and harmonious rules on the subject, without any legislative aid. Perhaps, also, a simplification of the rules of practice of the several courts might also be effected, which might prevent the frequent mistakes and slips arising from the complex system of the practice, and which occasion proceedings to be often set aside, and the time of the court and judges in chambers to be much occupied with applications on mere matters of form. The learning of the practice of the several courts is arranged, with admirable skill and precision, in two large closely printed octavo volumes of near one thousand five hundred pages, by Mr. Tidd. Of all a lawyer's studies it is the most irksome and the most necessary. I cannot help thinking that this whole code of procedure might be curtailed and simplified by a strict investigation into its forms.

On the subject of the experiment made for the despatch of business in the King's Bench by the Act of 3 Geo. 4. c. 102. enabling the three puisne judges to constitute the court for hearing and deciding special arguments, &c. with cases, I believe there is little difference of opi-

nion in the legal profession. However beneficial the plan might appear likely to prove, few persons who have observed its results would think that the interests of the public are likely to be advanced by its continuance; and that the unsuccessful result of the plan arises from something defective in itself, and not from any obstacles in the way of its being fairly tried, will be admitted by all who observe and admire (as I sincerely have) the learning, acuteness, and indefatigable industry of the three eminent judges, who have exerted themselves to the utmost to render the court serviceable. Mr. Brougham, in his speech, has described the circumstances, divesting it of those accessories of publicity and dignity, which ought surely to belong to the first court in the kingdom, sitting in bank on solemn questions of right, and which are remarkably absent from this fraction of the Court of King's Bench, invested with the powers of the full court. To a spectator the court must appear to be disposing of some by-business, in which no one had any concern, which even the senior counsel in the cause leaves to the hands of his junior and the attorney, and yet this by-business, thus disposed of, without the desirable presence of the public eye, is nothing less than the most important business of the Court of King's Bench, deciding special

cases, special verdicts reserved, on account of legal difficulty, for the decision of the full court, solemn questions of law, and on the propriety of confirming or over-ruling the decisions of judges, at Nisi Prius, in the greatest proportion of all which cases their decision is without appeal. From an obvious propriety, the court never decides on questions as to new trials in London and Middlesex, where the cases have been tried before the chief justice, it being desirable that the chief justice himself should assist in the decision of such cases. I believe, sir, that in no cases can the decisions of the court be satisfactory to the suitors and the profession, unless the head of the court is a party to them.

I apprehend that the plan of the partition of a court of justice is radically defective, and the sittings at Nisi Prius form no exception to this principle; since from the nature of the proceeding, only one judge can there preside, that judge is in London and Middlesex always the president of the court; and besides the proceeding is only a species of delegated and ancillary inquiry into mere facts, subject to the review of the full court in bank, and never final in its nature.

With a view, also, to the weight and authority of the decisions as legal precedents, highly as the individual judgments of these three learned

judges are esteemed by the profession, I confes it appears to me not calculated to preserve the respect in which the current of the decisions of the first court in the kingdom have been, and are, and always should be held, that a large class of them should go forth to the legal world wanting the authority of one judge of the court—and that one so distinguished a person in station, and so truly venerable for learning and acuteness as the chief justice.

The great increase of the small business of Nisi Prius in the King's Bench, has of course had no effect in creating a proportionate increase of the term business. The following statement will show, that in the last three years the heavy business of the court of King's Bench in term time has not materially increased, nor does the present arrear seem to be of a very appalling nature.

Cases remaining to be disposed of.	Crown Paper. Containing criminal matters, sessions appeal cases.	Special Paper. Containing special cases, demurrers, special verdicts.	New Trial Paper. Containing the motions for new trials from the assizes and sittings.
1826. Hilary Term	4	26	61
1827. Hilary Term	7	30	74
1828. Hilary Term	8	39	56

If the appointment of new judges suggested by Mr. Brougham should take place, it would enable the business of bail, (which has of late diminished by the effect of the Solicitor General's act raising the sum required for arresting a debtor,) and all common motions, and the business of chambers to be transacted by one judge, and a full court of four judges to sit the whole of every day in term time, on the important business of the court. This arrangement would, I imagine, probably have the effect of keeping down the accumulation of business, and at the same time giving full satisfaction to the suitors, and the profession in the mode of decision.

Nor, sir, in these arrangements for the public convenience, should the reasonable comfort and health of the judges themselves be overlooked. A mass of labour is now accumulated on the judges of the King's Bench, especially on the

learned chief justice, which almost necessarily excludes regard to health and the reasonable comforts of life. Those who think a judge's business consists simply in sitting in court, and hearing and deciding cases for six hours a day, are much mistaken. The reading and sifting of papers, looking into authorities—framing elaborate and learned judgments on important cases—the necessary reading of legal works—the attendance in chambers on points of practice—the advising on acts of parliament referred from the house of lords, are only a portion of the heavy duties performed by them for the public, but out of the public view, and by the sacrifice of domestic recreations. That the same number of judges who were considered necessary five centuries ago (when our population and commerce were not one-sixth of what they now are) for the judicial business, should now be able to despatch it, is truly a matter of surprise. Fortescue does indeed in some degree account for the fact, by telling us "you are to know further that the *judges of England do not sit in the king's courts above three hours in the day, that is, from eight in the morning till eleven; the courts are not open in the afternoon.* The judges when they have taken their refreshments spend the rest of the day in the study of the laws, reading of the Holy Scriptures, and other innocent amusements at their pleasure; *it seems*

rather a life of contemplation, than of much action!"* That it is now rather too much a life of action and no contemplation is perhaps to be feared.

If such an increase of judges were made, I confess I cannot but think that the principality of Wales would be more satisfied with the administration of justice by judges of the superior courts presiding at their assizes. In some of the Welsh circuits, the present system, and other causes, have had a decided effect in deterring suitors from commencing their transitory suits in the jurisdiction, and have induced them to lay the venue, and try their causes in adjoining counties, where English judges preside. In one county to which I allude, there are, consequently, not above one-fourth of the number of causes tried which might be expected from its size, population, and trade, while the assizes are protracted by the two judges trying every prisoner and cause jointly, instead of sitting in separate courts. Whether the local judicature in the principality should or should not be abolished, is a wide subject on which I have not information to enter. In some respects it saves expense otherwise incurred by employing London agents, and receiving process from London.

* Fortescue de laudibus legum Angliæ, p. 196. (Amos's edition.)

I believe, sir, that those well acquainted with the present system are impressed with serious evils and inconveniences which require removal, but which must first demand investigation in detail. The evil of their being no appeal from the nisi prius judges to a full court, unless by bill of exceptions, and a removal of the proceedings into the King's Bench, is very serious. When the two judges have tried a cause at Nisi Prius, and mistaken the law, or misdirected the jury (as occasionally happens),what satisfaction can it be to the suitor to move for a new trial before these same judges?

Mr. Brougham mentions an instance on a late Welsh circuit, where, out of forty-six causes set down, twenty were left untried. I am informed that this evil was almost entirely occasioned by the very extraordinary number of the cases in which the witnesses were Welshmen, and the necessary delay of all the evidence passing through the medium of interpreters; and though a learned Welsh judge, not long ago, certainly did refuse an interpretation of English witnesses' testimony into Welsh, for the benefit of Welsh jurors, (considering that this would be a violation of the statute requiring the proceedings to be entirely in English), yet no case in the principality has as yet decided, that English jurors must decide on Welsh evidence without

the aid of an interpreter. Until, therefore, his Majesty's Celtic subjects can be persuaded to learn the English language, the proceedings, under any system, must be much lengthened by interpretation.

Before quitting the subject of courts and judges, I cannot forbear to express my surprise at the strange proposal to remunerate the judges in part by fees, in order to stimulate their industry and despatch. That the judges should be excluded from all hopes of advancement, that the puisne judge, with the habits and experience acquired by his judicial labours, should in no case be removed to a higher station, for which he has undergone the best preparation, certainly appears to me a proposition not likely to be conducive to the good of the public, or the adequate filling of the justice seat. But whether the motive of hope is allowed or denied to the inferior judge, I can conceive no plan more derogatory to the character of the Bench, likely to be less effectual as a stimulus, or more prejudicial in other points, than the plan of remuneration by fees. In principle, I think, sir, a judge ought to be placed in an elevated independence far above the influence of any such excitements. If the country cannot depend for all his industry and exertions on a sense

of duty, and an honourable regard to fame, the selection of the man has been wrongly made. The wretched stimulus of a few additional pounds in a term, will never call forth the abilities and powers of such men as are morally, as well as intellectually, fitted for a seat on the Bench. But how do we find the case in fact? Are any exertions now wanting? In courts where there is business to do, is not every nerve strained by the judges for its despatch? Almost the necessary recreations and intervals are denied to themselves and the bar, (of which Mr. Brougham gives an instance), in order to prevent the public business falling into arrear—what stimulus could induce them to do more? But, sir, observe the effects which such a plan must have on the minds of the judges and the public. The conscientious judge would be afraid of accelerating and despatching business, lest he should fall for a moment under the imputation of precipitancy, influenced by sordid motives; while, if we suppose for a moment judges of such feelings and principles as Mr. Brougham's proposition seems to imagine, can it be wise to expose such men to the temptation of hurrying forward with haste and negligence the suits before them, in order to gratify a love of lucre, which, where it strongly

exists, is seldom scrupulous in its means. To high-minded judges, the plan would be an insult and an obstruction; to the sordid, it would be a snare and a temptation. Nor would it tend less to create suspicion, and give a handle to animadversion. When the judge disposed of a clear case with summary decision, or by honourable zeal terminated a difficult one, I think it is easy to foresee that the defeated party, or the malignant observer, would often ascribe the despatch to the judge's interest in his fees; wounding the honourable feelings of the judge, and discrediting, to a certain extent, the soundness of the judgment and the character of the Bench. In criminal cases, where life and liberty are concerned, the proposal is doubly objectionable. Nor if the means were less objectionable, is the principle of applying a stimulus to a judge's progress in his duties, I conceive, free from objection. Haste and precipitancy are qualities, more than any others, mischievous on the seat of justice. Lord Bacon, among his admirable rules for a judge's conduct, says, "Patience and gravity of bearing is an essential part of justice, and an over-speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have learned in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent

information by questions though pertinent * ;" and again he says, " Let not a judge meet the cause half-way, nor give occasion to the parties to say his counsel or proofs were not heard ;" and he advises judge Hutton to be " a light to jurors to open their eyes, but not a guide to lead them by the noses ; that he should not affect pregnancy and expedition by an impatient and catching hearing of counsellors at the bar †." I rejoice, sir, to see from your remarks in the House of Commons, that this new experiment for despatch of judicial business is not likely to meet with your sanction.

Having thus, sir, noticed some of the principal topics presented by Mr. Brougham connected with the important object of rendering the superior courts more adequate to increasing litigation, I must, before proceeding to other topics, beg to protest against a notion that sometimes is afloat, regarding litigation as of itself necessarily an evil, and its increase as a symptom indicative of something wrong requiring remedy. This notion can only to a very limited extent be sound. That litigation which in earlier stages of society might be traced to

* Essay on Judicature.

† Speech to judge Hutton on being called a judge of the Common Pleas. Bacon's Works.

maintenance and champerty—to those "sowers of suits who made the courts swell and the country pine"—was an undoubted evil—but an evil which in the present condition of society is hardly known. So also all that litigation which arises from insolvencies, from the refusal of just demands, is to be lamented; but though it may indicate bad circumstances, unsuccessful trade, and other causes, the laws are not to be charged with these misfortunes. The only kind of litigation, the increase of which is to be in any degree ascribed to the state of the law, is that which consists in laying hold of legal forms for evasive and dilatory purposes, in gaining technical advantages at the expense of right. Where this is found to be often the case, in judicial proceedings, it may be a ground for the legislator to consider and inquire; though it is obvious that even much of this sort of contest arises from the inevitable abuse to which the best laws may be distorted, and does not necessarily show that the law is wrong. When or where did laws ever exist which knaves and fraudulent debtors were not able to wrest to purposes of fraud, and vexation, and delay? But as to the fair contentions between parties disputing actual rights, I believe, sir, that the increase of suits of this sort, so far from being an alarming symptom, is in fact the reverse. We know,

sir, that no seasons have been marked by such inactivity in the law (with the exception of some sudden commercial convulsions), as periods of stagnant trade and commercial distrust. In every flourishing state, sir, the judicial forums have been not less thronged than the ports, the exchanges, and the marts of the country; and I believe, sir, that the increase of fair forensic contests indicate a proportionate increase of contracts, of transfers of property, of enterprises of all sorts, which, whether in success or failure, create conflicting claims and questions of doubtful right. Not only, sir, must litigations increase in number, but they must necessarily become more complicated as the relations of life multiply, and business of all sorts become more perplexed with details. Gibbon, in speaking of the difference between the comparative simplicity of criminal and the perplexity of civil jurisprudence, observes, "our relations to each other are infinite, our obligations are created, annulled, and modified by injuries, benefits, and promises, and the interpretation of voluntary contracts and testaments, which are often dictated by fraud or ignorance, affords a long and laborious exercise to the sagacity of the judge. The business of life is multiplied by the extent of commerce and dominion, and the residence of

the parties in different provinces of our empire is productive of doubt, delay, and inevitable appeals from the local to the supreme magistrate*." The determined simplifier of law, the enemy to protracted suits, may abolish the perplexity of the commercial code, and the long and difficult investigations which it occasions—but he must first annihilate commerce. He may set at rest all the puzzling questions on constructions of wills, of deeds, and of contracts which parties have framed according to their interests or their caprices; but he must first put testators, and tradesmen, and merchants into leading strings, lest by disposing at pleasure of their property and goods, they should perchance occasion a long law-suit, at their own expense, in Westminster Hall. He may put an end to the difficulties arising from trusts, and entails, and settlements—but he must thus attack all proprietors and landowners, forbid exercising full dominion over their hereditary estates, by family settlements, by trusts for younger children, annuitants, and married women; by entails, preventing the estate being squandered by life owners.

Sir, if all these ends were effected—if contracts were fettered—if testamentary disposition and

* Gibbon's Decline and Fall, &c. vol. 8. p. 109.

entails were abolished—if accumulations of wealth were scattered—if the web of society were thus pulled to pieces, I grant we should have shorter and fewer law-suits, less expensive legal conveyances, less complex questions; Westminster Hall might be shut up, the twelve judges paid off; and piepoudre courts, headed by unpaid grocers, might be sufficient for the cheap despatch of the remaining litigations of the first people in Europe.

Sir, I do not desire to treat this subject with levity, but I would fain that persons would look twice, and regard both sides of the question; and then they would perceive how much of the length, of the frequency, of the delay, of the expense of litigations in this country necessarily arise from the wealth, the institutions, the manners, the general scale of all things in the country, and would make a proportionate deduction from the unmeasured obloquy which they throw upon the laws.

Mr. Brougham proposes to alter the laws as to the evidence of witnesses and parties in the cause.

The framers of our law of evidence have adapted it to the species of trial established in the country, trial by a jury; as connected with the adjudication by a popular body and not by a judge, it must be considered. The object of

course of all rules of evidence is to elicit as much truth with as little admixture of falsehood, as the imperfections of moral and religious obligations, and the defects of all general rules, will allow. The English lawyers have thought it wise for that object, to exclude certain classes from even being produced to a jury to give testimony, judging according to general rules founded in the nature of human motives*, that no faithworthy evidence could in the generality of these

* The Roman law was far more strict than our own in its rules as to incompetency of witnesses; a father could not give evidence for his son, nor a son for his father; nor were any relations as far as cousins german compellable to give evidence against one another, nor was the testimony of servants receivable for their masters. But what is more to the present purpose, under the rule "nemo in re sua suorumque testis esse posse dicitur," Dig. lib. 10, a large class of interested witnesses were excluded. The principle laid down by Huber is very much the same as that of the English law, "Propriam causam ab aliena quemadmodum discernimus? Et palam est eam esse propriam causam cujus emolumentum vel damnum ad aliquem *in totum vel pro parte* suo nomine pertinet." Hub. Præ. J. C. lib. xxii. tel. 5. The rule extended to cases of parties liable to indemnify the suitor calling them; "Ergo non tantum dominus vel cui directe jus in re vel ad rem est intelligitur, sed etiam venditor in causa emptoris, cedens in causâ cessionarii et quacunque reum indemnem præstare debent." *Ibid.* This law prevails now in great part of the continent.

cases be expected from them. As to the exclusion of the insane, the infidel, the childish, the person convicted of crime, I need not now inquire; but it is proposed to do away with the rule which excludes parties on the ground of *interest* in the cause, and to allow all persons interested to be examined, leaving the jury to decide in the particular case, whether their testimony is credible. Considering the infinite degrees and diversities of interest which may influence the mind of a witness in particular circumstances, it is, of course, a delicate matter to fix the precise line where competency is to begin, and exclusion to end. And no possible line could be drawn on the subject which might not be open to cavil, as too narrow or too comprehensive. The rule which our courts have gradually, and after the benefits of experience established, is laid down by Chief Baron Gilbert *. "The law looks upon a witness as interested, where there is a *certain benefit or disadvantage to the witness attending the consequence of the cause one way:*" in addition to this direct interest, "if the witness can avail himself of the verdict so as to give it in evidence in support of his own claims; or if the verdict can be used in evidence against him, in

* Gilbert's Law of Evidence, p. 106.

case the party for whom he should be a witness should fail in the action, that is a direct and immediate interest in the cost of the suit, which will render him incompetent*." It is not now my business to inquire, whether this rule on the subject may be the very best which might be adopted, or whether the exceptions admitted in its application are wise or unwise. It is proposed to sweep away the rule, and to admit all interested witnesses to give testimony. This sweeping proposition I humbly consider to be unwise and impolitic. The law in this matter appears to act on a sound and clear principle. It does not exclude the witness on the ground of bias, of relationship, of affection for the party to the suit. All these motives, though highly influential and affording strong grounds for observation, and even in some cases, exceeding in force the motive of interest, are yet regarded as too uncertain, and varying according to individual tempers and feelings, to be the ground for any well-grounded presumption that the motive will overpower the witness's regard to the truth. But while some persons act more and some less under the influence of these feelings—the law considers self-interest as a more universal, fixed, and unvarying rule of action; which, though it may often yield to integrity and to

* Phillips on the Law of Evidence, vol. p. 53.

various passions, is on the main so powerful, that when the interest is clear and direct, (as it must be in order to exclude the witness,) the law considers the fact as raising a fair presumption, that whether voluntarily or imperceptibly, the evidence of the witness will more or less be mixed with falsehood in favour of the side for which he speaks.

I am aware, it is not enough to show that interest is more invariably and generally hostile to true testimony than bias, unless the hostility of interest is also shown to be such, that it forms a sufficient positive ground for exclusion. But the distinction above drawn is, I think, a sufficient answer to the charge of inconsistency often made against the law, in excluding an interested and admitting a biassed witness. The two cases appear widely different. The extreme instance put by Mr. Brougham, by taking a case of a minimum of interest and a maximum of bias, was well calculated for effect in a speech. When Mr. Brougham puts as a proof of the absurdity of the law the case of a man with a shilling interest in *reversion* on an estate, being incompetent as a witness for the owner in possession, whereas, the son and *heir* of the old and bed-ridden owner may be his witness, to support his possession, he must be aware that this argument, derived from ex-

treme cases, is the old Horatian fallacy*, on which every possible rule, however wise, may be attacked. The freeholder with thirty-nine shillings and ten-pence per ann. may as well exclaim—Absurd rule, which excludes me, a man of education, of intelligence, of wealth, from electing, while my next door neighbour, an ignorant labourer, votes for the county member, just because he has two-pence per annum in freehold more than I have!

Mr. Phillipps thus states the rule point, and the reason: "An heir-apparent is a competent witness concerning the title to the land, for the heirship is a *mere contingency;* but a remainderman is not competent on such a subject, having a *present interest* in the land †."

Now, giving £50,000 value to the heir's expectancy, making his father aged and bed-ridden, and reducing the interest of the remainderman or reversioner to "the extent of a shilling," as Mr. Brougham did, the contrast is glaringly dressed out; but taking the uncoloured middle cases, in fair reasoning surely the remainderman's present vested interest, which he may turn into money any hour, and which in many cases cannot be defeated, is a case of near and direct interest in the suit while the contingent expectancy of an heir, worth nothing in present money, and which may be de-

* Utor permisso, caudæque pilos ut equinæ
Paulatim vello, &c. HOR. Epist. ii.

† Phillipps on Evidence, vol. i. p. 60.

feated any hour by a sale or a will, and, in many cases, by a birth, amounts at most to a case of bias in favour of the owner in possession. The one is a case of bias, of inclination, the other of vested pecuniary interest in any verdict respecting the land. Surely, therefore, those who approve the law, admitting a witness only affected with bias, are by no means driven to admit the propriety of receiving witnesses affected by direct interest. But if the law is not inconsistent, is it irrational in its exclusion?

It will hardly be denied, that the exclusion of falsehood from testimony* must be regarded as quite as desirable and important an end of the law as the admission of truth. Indeed, looking at the dreadful evils which may be worked by false evidence in courts, it cannot be doubted, that the exclusion of false witnesses in some cases is well purchased by the consequent exclusion of truth in many others. The precise proportions between the two cases necessary to show the rule wise, I will not pretend to determine. The rule has the advantage of excluding *all falsehoods and perjury arising*

* There are two exclusions from giving evidence which I cannot but hope to see removed as resting on no sound reason—viz. that of a Quaker who, though admissible in civil cases, is inconsistently excluded in criminal prosecutions, from remains of an old prejudice reprobated by Lord Mansfield, and various Judges (see Cowp. R. 390); and the absurd and inconvenient exclusion of a party, whose name is forged, from giving evidence on a prosecution for forgery (see 1 Phillipps, 113).

from interest. What sacrifice of evidence of truth must be considered to be put up with as the price of the benefits of the rule?

Taking the average run of witnesses who appear in courts of justice, I fear it can hardly be doubted, that one at least in twenty would not be restrained from speaking direct falsehood, though on oath, if his actual pecuniary interest obviously depended on it.

Is it then to be considered that we exclude truth in nineteen instances, in order to keep out falsehood in one? far from it. How many of the remaining interested witnesses must be considered as so involuntarily swayed on the matter in which their interest is concerned, as to leave their testimony a tissue of misrepresentation, in which facts are distorted and discoloured where truth and falsehood imperceptibly blend in a manner calculated to deceive rather than to inform. Probably, scarcely two out of the nineteen would be found whose admirably regulated sense and stern integrity would guarantee their testimony against any corruption from their interest. In the inscrutability of human motives, who is to judge between these classes? what judge or jury can say which is the one directly and wilfully perjured—which the considerable number involuntarily swayed by their interests—and which the two extraordinary persons proof against even the imperceptible influ-

ence of sinister motive? If a devisee in a will were put into the box to prove the sanity of a testator, or the defendant's bail to prove that the debt was not due, and there were no other evidence on the side, could the judge or jury with satisfaction pronounce one way or the other? Does not common sense reject the idea of a cause being decided on such evidence alone? and yet if the evidence, standing alone, is not sufficient to induce belief, I cannot see how it can tend in any material degree to corroborate other testimony which is credible. It is not necessary to show that the jury would be bound in such cases positively to disbelieve the evidence as clear falsehood. Evidence submitted to such a tribunal as a jury surely should be of an untainted character. Though accomplices are admitted, it is for the urgent object of discovering crime, and the perjuries and evils resulting are very considerable. What advantage can be gained by admitting testimony which, weighed according to common sense, is calculated to produce that wavering, suspicious state of mind which ought not to lead a court to pronounce a positive verdict. Chief Baron Gilbert observes, "where a man who is interested in the matter in question comes to prove it, it is rather ground for distrust than any just cause of belief; for men are generally so short-sighted as to look at their own private benefit, which is near to

them, rather than to the good of the world, which is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony than to believe it."

But this evidence, according to the proposed plan, would be left to the jury with the judge's observations; they would have to decide whether or not the witness was in fact interested, and whether that interest deprived the testimony of its credit in their minds. I will not insist much on the long and perplexed collateral issues which must thus be presented to the jury, and discussed by the counsel and the judge as to the amount and kind, the remoteness or nearness of the interest, and the character, habits, morals, and religious principles of the witness, which must necessarily be inquired into, to enable the jury to judge of the degree of interest and the amount of conscience of the witness. These great inconveniences must certainly be submitted to, if the interested witness is a proper medium for arriving at truth; though surely it is not desirable to leave to a jury, in addition to all the complex merits of the cause, collateral questions as to the existence and degree of the interest—whether witness A.'s coat and demeanour and character, as far as they appear, show him to be a person with a conscience vulnerable to an

expectancy of £500; or, on the other hand, a person entirely above sinister motive, under £1000. If the jury refused thus to gauge the conscience and weigh the interest of the witness (as I think they often would), it would be because the only satisfactory way of dealing with such evidence would be to strike it out—not as false—not as clearly incredible, but as so unsatisfactory—so suspicious as not to be the ground of a rational conviction. If juries did this of their own accord, or if the judge (as I believe he generally would do), after recapitulating the facts of the interest of the witness, in the event of the cause, told the jury to decide for themselves, but that he could not tell them that a witness in such circumstances was worthy of belief, or fit to turn the verdict, then the evidence would be virtually excluded without the benefit of being so directly. If the evidence is to be neutralized, it is best neutralized by being rejected. What proprieties of demeanour, or respectability of appearance, or consistency of statement, can, before a jury, satisfactorily get over the fact of the interest? Judges and juries do not, and ought not to subtilise; they rightly draw broad lines; they would not read Mr. Hume's, or Mr. Bentham's *,

* Traité des Preuves Judiciaires, by Mr. Bentham and M. Dumont.

or Mr. Long's * ingenious views of the metaphysics of belief, to see whether they ought, as philosophers, to believe a witness in spite of interest. They would put it to themselves, "are we justified in letting the plaintiff turn the defendant out of his estate on the evidence of a man who is to get half of it?"

But then it may be said, if juries thus throw overboard the testimony, at all events it does no harm to leave it to them. If the evidence can do no good, the reason for change fails. But all evidence not fitted to produce belief necessarily does harm, for though I believe judges and juries in such cases would generally act or intend to act as above stated, especially when the interested testimony stood alone, yet, where it was mixed with other testimony, every one knows how impossible it is to remove from the mind of juries the impression produced, however suspicious the medium through which it is made. The judge in vain erases the testimony from his notes, in vain tells the jury it is unworthy of faith—the impression made remains. If the evidence is not of that character on which juries, under the advice of judges, can safely act in taking an estate from one man

* The opposite side of this question is exceedingly well stated in a work entitled "Reflections on certain Parts of the Law of England, by George Long, Esq. Barrister at Law," 1827.

and giving it to another, surely the safer course is to reject it. In doing so, we reject *some* wilful perjury and falsehood, *much* suspicious, and coloured, and distorted evidence, and, I believe, *a little*, and but a little of unmixed truth. If courts now perpetually exhibit disgraceful scenes of flat contradiction, on plain facts, arising from the bias, and the inclinations, and zeal of witnesses for friends and partizans, to how much more lamentable an extent would such scenes be carried, if we allowed the witness's box to be filled in succession by the gainers and losers, stimulated to perjury by pecuniary and direct interest, in addition to the other motives which now so often pervert truth?

Mr. Brougham proposes also to examine the parties in their own cause, and Mr. Bentham, who likens the proceeding of a court of criminal justice to that which, on many accounts, I think it essentially unlike, the domestic tribunal of a father at the head of his family, says that the party accusing or accused would be naturally brought before the pater familias. Mr. Brougham observes, that the parties are by the present law examined before arbitrators. Mr. Long, who does not extend his principle to the parties themselves, admits that every witness who makes himself a party *in effect*, though not in name, should be excluded. In this predicament, I humbly conceive every interested wit-

ness strictly stands. Sir, all the remarks above made as to interested witnesses apply with double force to that most interested of all witnesses the party to the suit. If judges and juries would feel hesitation and difficulty in acting on the evidence of interested witnesses, I believe they would have little hesitation in declining to act in general cases, on the evidence of a party coming to prove his own case. Before arbitrators the parties are heard as parties rather as witnesses. In many such cases they alone state their case without professional assistance, and where advocates are present the less formal nature of the proceeding leaves the party to take some kind of part with his counsel. In courts of justice the parties are heard as parties by the record and by their counsel speaking from their instructions. Is it seriously proposed after their counsel's statement, to swear them in the witness's box to prove it?

Mr. Brougham says they are now heard to state their cases on affidavit in business in term time, and while he proposes the examination of parties *vivâ voce* in their own cases, he expresses a hope that something may be done to check the practice of trying cases on affidavit of the parties. As media of proof affidavits are certainly less objectionable before judges—a trial on affidavits before a jury would be intolerable.

But certainly perjury is never more frequently committed, than in affidavits of parties for their own interest, as the records of our courts prove; and if the conduct of business allowed of it, I would rather see the principle of having the parties sworn, reduced in the case of affidavits in equity, and in term business at common law, than extended by swearing them in their own causes on a *vivâ voce* examination. Undoubtedly the publicity of an open court and cross examination are checks to a certain extent in the latter case, which do not exist in the former. Perhaps the cases of deliberate and premeditated perjury would be more frequent in the oaths on prepared affidavits, than in the extempore depositions before a jury. But I much doubt whether more actual false swearing would not take place in the *vivâ voce* examination arising from the heat and excitement of the moment, the half unperceived, half designed colouring given to statements directed to produce an impression on the court and jury, to whom the witness speaks. Mr. Brougham himself says that "though he does not think perjury would become more frequent by the alteration, yet he was rather afraid it would produce an eagerness which would make men swear as was technically called *near the wind**." I confess, sir, I am at a loss

* Times Newspaper.

to translate the technical phrase into any other English, than the word "perjury;" perjury *in foro conscientiæ*, though not perjury on which Mr. Brougham might procure the conviction of the party before a jury.

At the same time, sir, I will confess that this question (though I have considered it as falling within the principle of interested witnesses), rather reduces itself into the question, whether *one party should be allowed to extract a vivâ voce discovery on oath at common law from his adversary*, as he may now do on paper in equity. Whether the plaintiff or defendant having spoken by the record, and through his counsel, all which can turn to his advantage, should then be sworn to prove his statement, I confess hardly appears to me to be a question: a failure of justice seldom or never happens for want of this power—parties knowing the law secure themselves by writings or by witnesses in their dealings, or if they do not it is their own folly. The temptation to perjury is obvious. The exceptions * which

* See the exceptions stated by Mr. Phillipps, Vol. 1, p. 111. These exceptions were also recognised by the Roman law (see Huber Prælec. Jur. Civ. lib. xxii. tit. 5.): "accedente hac ratione quod alioqui vix ulla crimina probari, atque punire possent,"—precisely the version of the English law.

admit the party injured in various criminal prosecutions, though a reward is gained, and in some actions for penalties where he certainly has a pecuniary interest, proceed on the ground of necessity or of the proceeding being substantially *penal* and not *compensatory*, and do not shake the principle of the rule.

But whether the rule of equity, as to discovery on oath for the benefit of the opposite party, should be extended to examinations at law, is perhaps a matter affording ground for difference of opinion and inquiry. Mr. Justice Blackstone * observes on this point, "how far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be a matter of curious discussion, but is foreign to our present inquiries. It has long been introduced and established in our courts of equity, not to mention the civil law courts, and it seems the height of judicial absurdity that in the same case, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other." It must be admitted, that the plaintiff in an

* Comm. Vol. 3. p. 381.

action at common law, whose case depends on matters in the knowledge of the defendant, is now driven to a circuitous and expensive proceeding in equity, to obtain the defendant's discovery on oath, which he then reads against him in the action at law. If the plaintiff could obtain the facts, by examining the defendant in the witness' box, we should "arrive at the end by a cheap and direct road, instead of an expensive and crooked way." Whether the circumstances of a public, extempore, and vivâ voce examination of a party in order to furnish evidence against himself are so essentially distinguishable from the calm and deliberate answer prepared in chambers with legal advice to written interrogatories, as to make the compulsory examination in the latter mode judicious, but injudicious in the former, is a question on which my leisure has not enabled me to form a decided opinion. In accomplishing such a plan, a Court of Law must, I apprehend, be to a great degree turned into a Court of Equity. According to established rules, as well as to common sense, the discovery cannot be enforced till a primâ facie case is made out by the plaintiff. It could not be endured that a plaintiff, by merely suing out a writ, should drag a defendant to the witness box and place him under the examination of an opposed advocate. Respectable defendants would yield to unjust claims rather than encounter such assaults. The subject requires much consideration. I confess I doubt the practicability of the plan.

Another proposition made by Mr. Brougham is, that contracts of all sorts to be valid must be put into writing. One of the reasons advanced for this change is that the French law requires writing in all contracts, where the matter is above the value of 170 francs. If the code Napoleon so provides on the other hand, the code of Justinian does not so provide*; the laws of Germany in general do not require writing. In the greater part of Germany, the old custom of shaking hands (*handschlage*) binds a bargain, so that the argument from the mere fact of the law of a foreign country is at least neutralized. But such an argument can be surely of no weight, unless we are shown that the code of France in this respect is beneficial in its operation (which many of its provisions are not) and is approved by the people of France, which is by no means the case with all its branches. For aught that we are informed, this very provision (like the French system on the subjects of bankruptcy and hypothecations) may be found inconvenient in practice. But admitting that it were shown to be useful in France, I humbly conceive that this affords no sound reason for introducing it as an experiment here, unless a ground is laid by showing that our own system of parol contracts in the less special matters of life works

* The symbols of the very early Roman law are well known—"The indenture of Covenants was a broken straw." Gib. Dec. vol. viii. p. 21.—*Stipula,* whence the word "stipulate."

mischief. Is any such ground made out? By the Statute of Frauds, a very large class of important contracts now require writing; all contracts respecting the sale of land—agreements to pay the debts of third parties—agreements by executors to pay their testator's debt out of their own funds—agreements made in consideration of marriage—agreements not to be performed in one year from the time of making. And also contracts for things above the value of £10., unless an earnest is paid in money, or the goods are in part delivered. It may, perhaps, be admitted, that there is wisdom in thus requiring writing to contracts of this special and important nature, including so many of the most frequent and weighty bargains in life, which, from their very importance, are not likely to be entered into under circumstances where writing is an inconvenience to the parties. But, sir, notwithstanding that this law was prepared by Sir M. Hale, Sir Leoline Jenkins, and other distinguished lawyers, it has, from the time of Charles II. to the present day, occasioned a multiplicity of litigation in all courts at law and equity, exceeding that produced by any other statute or body of statutes,—a litigation which must be considered a large set-off against its benefits. There is one immense class of decisions as to the point, whether the signature is or is not sufficient; another, as to the precise construc-

tion of the word "agreement"—another, as to whether a signature by an agent is sufficient—another, as to the point whether a printed name in a bill of parcels is a signature; an immense accumulation of cases as to making out a written agreement from the detached contents of different letters. Then the difficulty was found soon after the statute, that it was impossible to hold cases within it, where the agreement was in part or in whole performed on one side—where it was executed, as lawyers express it; otherwise a vendee, buying an estate, and getting possession, might turn round on the seller, and refuse the price for want of a contract in writing. Such cases being, therefore, necessarily out of the statute, an infinity of questions have been discussed, and are now perpetually raised, as to what acts amount to a part performance, a part-delivery of goods, so as to make the contract executed, and preclude the necessity of writing. I admit that much of this contention has arisen in drawing the line between cases within and cases without the statute —and much from the peculiar wording of the law. A law extending to all contracts would certainly exclude questions as to the kind of contract intended; but questions as to what was a sufficient agreement in writing, a sufficient signing, what a part performance or execution, in short, what was or was not a compliance with

the words of the enactment, would have equally occurred though the statute had applied to all cases, and must occur on a new enactment, however framed. Mr. Sugden observes *, "I am not aware of any new law in my time which has not immediately led to litigation, in order to discover its meaning and settle its application." However, if the law is required, this must be submitted to. The question seems to be, whether perjury in proving parol contracts is now so frequent as to require a change. Perjury is certainly a public evil; and some such evil should, I think, be shown, before a change is made in a law affecting every-day business—before parties are told that in every trifling dealing of life they must have their inkhorn and paper at hand. What is to become of those who cannot read or write? Are stamps to be required in all cases, or is the stamp act to be altered?

The mere doubts arising from the loss of witnesses, which often occasion disputes upon parol agreements, do not seem to me, independent of the ground of perjury, to be a reason for *forcing* parties into written contracts, which they would not make of their own will. In many dealings on the Exchange, at markets, fairs, and other places, I apprehend such a universal rule would be found inconvenient. If writing is used where the law does not now require it, then the law need not order parties to do what they do voluntarily. If writing is not used in such cases, surely it proves that the people prefer trusting to words in their small dealings,

* *Letter to James* Humphreys, Esq. page 8.

though at the risk of a possible lawsuit, arising out of the uncertainty. The inconvenience seems theirs only. The late bankrupt acts and insolvent acts have required writing to a promise by a bankrupt or insolvent to pay his debts out of his future estate; but these are very special cases, in which bankrupts and insolvents were often held liable without any actual *promise*, on a mere acknowledgment of the existence of the debt *.

Mr. Brougham complains of evils in our system of special pleading, though I believe without proposing any definite alterations. It was hardly to be expected—certainly not to be desired—that Mr. Brougham, in a long speech on technical matters, should pass persecuted special pleading without amusing his audience, and enlivening a dry subject. The story, therefore, of his entertaining the court at York with the various counts in the case of Gilbert v. Sykes †, on a wager on the life of five or six several and separate Napoleon Buonapartes, must be regarded as an agreeable *sauce piquante* —not as an argument, showing the inutility or inexpediency of the practice of inserting several varying counts in the plaintiff's declaration. Mr. Brougham, in his youthful studies in the

* Might it not be well to alter the word "agreement" in the Statute of Frauds into "promise?" since a mere *promise* in writing is not held sufficient within the act, unless the consideration on the other side is also stated, so as to make an "agreement." The public do not understand this distinction, and the contracts invalid on this ground are innumerable. See Wain v. Walters, 5 East. R. 10. As to the variety of opinion among judges respecting the utility of this statute, *see* Preface to Roberts' Treatise on the Statutes.

† *16* East's Reports, 150.

Officina placitorum, of the truly and accurately learned Solicitor General, where he,

> For three hundred guineas paid,
> To this great master of the trade,
> Had at his rooms by special favour,
> His leave to use his best endeavour,
> By drawing pleas from ten till four,
> To earn him twice three hundred more,

must, I think, have discovered the utility of several counts in a declaration, as well as the uses of other parts of the pleading system to which he ungratefully objects. The general object of the declaration being the accurate statement of the plaintiff's case, so as to inform the defendant what he has to answer, three things are obviously necessary in it, fulness, clearness, and precision. If the declaration is not full and clear, it does not give the requisite information with adequate perspicuity to the defendant. If it is not precisely according with the real facts, the plaintiff is liable to be defeated at the trial by the evidence being at variance with the statement. The only effectual way in which this can be avoided, is by putting several complete and distinct statements on the record, which, while they give the sufficient information to the defendant, are yet adequate to meet any shape which in the great uncertainty of testimony the case may assume at the trial. Wherever the law allows a general form of statement (as in the

instances of *trover* and actions for money had and received, to which Mr. Brougham objects for their generality as much as to other declarations for particularity), none of these repetitions are necessary or in use—since the statement is sufficiently large to be consistent with any probable variations in the facts. But as in actions on special contracts, and on the special circumstances of the case, not falling within any of the general forms of writs in the Registrum Brevium, the law requires the facts grounding the legal claim to be stated for the information of the defendant, nothing would tend so much to nonsuits on mere points of form, and without touching the substantial merits, as to confine the plaintiff in such cases to a single count. If for instance, in the case of Sir Mark Sykes' verbal wager on Buonaparte's life, in an uncertain conversation after dinner, the plaintiff had only a single count, stating the wager to be in guineas, and the evidence proved it to be in pounds (not an unlikely point for doubt), the plaintiff must have been defeated, though all other points were in his favour. In a lax conversation it is easy to see how many other slight though essential points might be doubtful. What the precise variations in the counts were I do not know, since I had not the pleasure of being amused by Mr. Brougham's opening of the pleadings. Whether it was an instance of

abuse of the system, arising from the prodigality of the pleader, or his indolence in multiplying statements, in order to evade the trouble of selecting those views of the case which need alone be provided for (abuses which, I admit, are incident though not necessary to the system), or whether he only used the judicious variations required by the case, I have no means of knowing. But I have the high authority of the present Lord Chief Justice for saying, that a fair trial on the merits of the case, and an exclusion of mere questions of form, are very much secured by declarations containing such reasonably varied statements, as may suit any turns of the evidence at the trial. The counts must necessarily in such case be entire and complete in themselves. The varied statements could not be thrown alternatively into one count. The law properly forbids a party to state that he purchased of the defendant a hogshead of sugar, *or* coffee, *or* indigo, deliverable at London *or* Liverpool, at three, *or* four, *or* five months.

Nor can the difficulty be satisfactorily, in my opinion, removed by relaxing (as Mr. Brougham proposes) the rules of law as to variance, by allowing a party at the judge's discretion (according to Mr. B.'s proposition) to allege his case in one manner and prove it in another. By altering the law on this point I believe a greater evil than the varied counts in

a declaration would be introduced. The rules as to variance, sir, were certainly once applied with a degree of rigour which sacrificed substance to form; but in the rational light in which they are now considered, they appear to be indispensable for upholding consistency, regularity, and certainty in judicial proceedings. In setting forth a contract or instrument, if professed to be stated *verbatim*, it must be stated without any variation which alters the meaning of a word. If professed to be set out *in substance* and effect only, it must be in sense and meaning, though not to the letter accurately stated. Common sense seems to say that a party deliberately stating his case on the record in one shape, and leaving the defendant to suppose he means to abide by it, should not be allowed, on discovering a substantial mistake made by himself or his agent, to claim of the court to fly from his statement and succeed according to what he *meant* to state and not what he has stated. Why is the plaintiff in such a situation to be commiserated? Extreme instances may of course be found where this rule produces an evil. In general, parties may avoid the danger of variances by stating instruments, &c. succinctly, according to their *substance and legal effect*, as recommended by lord Mansfield and other judges; and it is the carelessness of the parties in introducing needless particulars which constantly occasions the

variance. In criminal cases the rules necessarily must be the same as in civil suits, except that where life and liberty are at stake, the judges consider somewhat stricter accuracy of proof requisite in order to convict the prisoner. I am informed, sir, that on the occasion of the passing of your late valuable criminal laws, the expediency of altering the laws in this respect was under consideration. "We * understand a clause was under discussion for relaxing the rules of law as to variations between the statements in the indictment, and the proof at the trial; but that on mature consideration of the matter, the learned judges were unfriendly to the adoption of any such clause †, as tending to introduce a laxity in criminal pleadings at once injurious to prisoners and perilous to the public. The truth is, the failures of justice occasionally resulting from defects in pleading are to be ascribed to the carelessness or ignorance of practitioners, and not to the vices of the system: however the system might be altered, it could never effectually provide against mischiefs arising from these causes. * * * So long as the rule is upheld, every Englishman is secure that

* Quarterly Review, No. 73, January, 1828.

† Lord Mansfield, also, though anxious to prevent slips and formal objections, said he was convinced it was better for justice the strict rule should prevail. See 2 Doug. R. 666.

he cannot be accused and condemned on a charge of which he has not received exact intimation; while the records of the courts will be sure to furnish accurate particulars of the crimes of which any individual has been convicted or acquitted, and thereby to supply him with a ready defence in case of a second accusation for the same act. In some occasional instances, the adherence to the rule may cause a failure of justice, which is only what must sometimes happen as to every general rule; but it is obvious that the rule must cease to be one, if the judge in each particular case is to decide whether it is fit to abide by the rule or to disregard it." And yet, sir, this is what Mr. Brougham proposes, "that nobody should be turned round on a variance *except at the discretion of the judges.*" Mr. B. was struck with the hardship of the particular case—a prosecution for perjury failed, the false affidavit stating the word "grandmother," and the indictment incorrectly stating it "mother,"—but are we, on this case, to admit a new principle? one always considered dangerous; one which our whole system of cases and precedents is made to exclude; one which the judges would, I think, deprecate, of leaving to them in cases of property, life, and liberty, to say according to no standard, or rule, or principle, simply whether (notwithstanding a variance in sense) they believe the libel or in-

strument stated to be the same as that proved—If the Judge might overrule the objection when a word was omitted, might he not also, though the omission was a line or sentence? The discretion must apply in all cases—in prosecutions for treason and libel as well as in actions would it not often be dangerous, and at least open to animadversion? would it not introduce an unsound principle in addition to laxity and uncertainty of proceedings, which would be greater evils than the present occasional failures? I am not aware of the particulars of the case noticed; but if the proceedings were set out *verbatim*, the variance was occasioned not by the law, but by ignorance of it; for the stat. 23 Geo. II. c. 11, s. 1, provides that "it shall be sufficient to set forth *the substance* of the offence, without setting forth the bill, indictment, &c. &c." If the evil of these failures can safely be remedied, I admit it is most desirable. If the strictness was observed in favour merely of the defendant, he might be required to give notice to the plaintiff of the variance, or otherwise to be excluded from insisting on it. But suppose the defendant overlooks it, and the judge perceives it at the trial, and that it alters the *meaning* of the libel or contract in however slight a degree, is it right that it should appear on the records of the Court that the plaintiff recovered on an instrument there stated, when in truth he recovered on one different in sense? How could records be authentic evidence if this were admitted?

Mr. Brougham objects to the actions of trover, and *for money had* and received, as being too *vague and brief*, and applying to a number of

cases, widely different in their facts. The action of trover, he says truly, is applicable to the case of the plaintiff's gun being lost by the plaintiff and found by the defendant, and wrongfully converted to his use. 2. To the case of a gun deposited and refused to be restored. 3. To a gun stopped in transitu, on the ground of bankruptcy (that is, sold to the bankrupt before bankruptcy, but not being finally delivered, equitably liable to be withheld from the buyer by the seller), and several other cases which it is unnecessary to enumerate. Now, sir, if the concise form of this action (which, though technical, is one of the cheapest, and simplest, and most useful in the pleader's repertory) occasioned doubt as to the point on which the parties go to trial, defendants would have a right to complain. But I think I may say, sir, this is never the case. The declaration tells the defendant the *legal effect* of his conduct. It tells him, "you have *converted wrongfully* to your use a gun, *my property*." (The fiction of losing and finding is understood, and deceives no one.) The details are matter of evidence and not of allegation. I believe there is never a case of this sort, in which the defendant goes to trial without perfect certainty whether it is a question as to a gun lost and found, a gun deposited for custody, a gun sold but stopped in transitu, &c. Independent of the communications that pass between the parties and their agents antecedent to an action—independent of the unfrequency of two parties being in contest at the same time about several gun transactions—there is one *authentic* means of information in the de-

fendant's power. I mean the particulars of the plaintiff's demand, which the defendant is entitled to obtain before pleading. These give him time, place, and every circumstance necessary to identify the business: and if not sufficient, a judge will order better. If it is said these particulars should be given in the declarations, I answer, if the same end is substantially attained by the present means, and no evil occasioned, why overturn an established form of action familiar to every judge and lawyer, interwoven with the series of decisions of the courts? If the particulars were thrust into the declaration, expense and length would infallibly be much increased. The declaration being then made specific and particular, it would be indispensable to have a variety of counts (instead of one), in order to avoid the dangers of variance, which occur in cases of more detailed declarations.

The same observations precisely apply to Mr. Brougham's objection to the action for money had and received. The declaration for money had and received says, in substance, to the defendant, "you have received money, to my use, by some means, which constitutes a debt of so much due from you to me." The particulars and details are not stated, but the want of them is entirely made up by the means above mentioned. I really believe, sir, that no suitor or practical

lawyer from Westminster could point out any real surprise or doubt before or at the trial, arising from this form of declaration. The action, from its very simplicity and expansive nature, has always been applauded by the greatest judges, and is found in practice, I believe, one of the most simple, available, and beneficial remedies now existing in our courts. What objection can it be to a legal remedy, that its virtues are applicable to a variety of widely different cases? cases, however, which are all branches of the same legal class of injury. If the generality of form produces no surprise, surely its brevity, cheapness, and general utility are merits, and not defects. It is nothing to say, why require particularity in declarations of special assumpsit, and admit generality in actions of trover, and money had and received? The answer is—the details are given in one action in the declaration, in the other by the particulars of demand—the end required is effectually ensured by different means.

Mr. Brougham objects also to the declarations in an action of trespass, as being almost all in the same form, whether the action is for seizing and taking goods, assaulting the person, or seducing the wife or daughter of the plaintiff. Undoubtedly, sir, all these matters being, in legal construction, trespasses, a certain form and certain words of art, which denote a

trespass, will be found in all the declarations. But Mr. Brougham could not have meant to assert, that each declaration of this sort did not contain a specific description of the actual injury complained of, amply sufficient for the purpose of distinction, and giving the requisite information to the defendant. Every declaration for an assault describes, even to a ludicrous minuteness, the nature of the assault. Contusions, and fractures, could hardly be more graphically brought before the Court. The declaration in trespass for seizing goods states distinctly and briefly, that the defendant forcibly seized, took, and carried away such and such goods described. The declaration for seduction or adultery describes by two energetic and certainly unambiguous phrases that injury which the counsel of the plaintiff may afterwards expatiate upon for six hours to a jury, without doing more than amplify the plain English of the pleader. Mr. Brougham observes, that the declaration in trespass to land where information is not so material (I really do not know for what reason) is stated with greater lengthiness of description than the other cases. Whether this amplification of style is more conspicuous in the description of the fences broken, the gates fractured, the grass trodden down, of a declaration for local trespass, or of the nose pulled, the hair torn, the limbs lacerated, of the assaulted plaintiff, I will not pretend to decide; but this, sir, is, I think, clear, that

each declaration of trespass of any sort states, in terms strong and not to be misunderstood, the grievance complained of. Indeed it is this coarse plainness and *naive* particularity of style that not unfrequently give to Mr. Brougham and other leaders pressed for a topic, a subject to amuse their audience, if not to obtain a verdict. That Mr. Brougham, with his experience, can talk about "counsel, court, and jury being left in the dark," as to the cause of action in declarations in trespass, I confess to me is surprising—that declarations in trespass are shorter in their dimensions and more downright in their expressions than declarations in actions on the case and special assumpsit, arises, I apprehend, solely from the more simple and palpable nature of the cause of action. Less is told because there is less to tell, and less nicety of phrases required. Even in these actions for injuries, or *torts* as they are called, if it were required, a particular of demand might be had; but, in truth, the particularity of the declaration has almost entirely obviated this practice.

Mr. Brougham also objects to the allowing so many different defences to be given in evidence on the general issue. In *theory* there is an incongruity. For instance, in an action on a bill or note, the defendant is allowed to say shortly and generally, *non assumpsit*, he did not contract; and then to set up a defence of usury, or gaming, or infancy, release, accord and satisfaction, which

admit the contract but show it void. Originally the plea of general issue was adapted only for a defence which denied the contract ever having been made; and the extension of it to the defences which admit the making but show the contract to be void, is a departure from the old principle gradually suffered by the courts. But unless an evil arises from this incongruity, now become inveterate in practice, why make an alteration? Instead of an evil, I believe there is a benefit. The very circumstance of a series of acute and experienced judges—seldom over ready to admit a departure from settled forms—having now for a century allowed these matters to be proved without being pleaded, raises a pretty strong presumption that this relaxation was not felt to be inconvenient in *practice;* and I believe that the experience of most lawyers of the present day would lead them to concur in that opinion. Mr. Stephen, in his valuable work on pleading, states that "it was probably first encouraged by the judges in consequence of a prevalent opinion that the rules of the science were somewhat more strict and subtle than is consistent with the ends of justice *." Blackstone expressly says, "though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet *experi-*

* Stephen on Pleading, p. 182.

ence has shown it to be otherwise, especially with the aid of a new trial in case either party be unfairly surprised by the other*." I believe surprises of this sort very seldom occur in trials. The plaintiff certainly is not quite so likely to be informed of the defendant's defence as the defendant of the plaintiff's claim; nor can he in general cases call for particulars, which, however, if found necessary, would not be an objectionable plan. The defence must, however, always arise in some way out of the real facts and transactions occurring between the parties, and which the plaintiff, therefore, is very much acquainted with, and able to inquire into before hand. Where a case of gross perjury is got up as a defence, a special plea would no more enable a plaintiff to meet it than the general issue, since, though it might let him know that usury or gaming was to be proved to nullify his claim, it would not give him the names of witnesses or particulars of evidence. Such rare cases must necessarily be left to the exposure of cross-examination, and the acuteness of the counsel.

Nor, I confess, do I think that the frequency of pleading the general issue is inconvenient on the ground of mixing up, as it

* Black. Comm. vol. iii. p. 305. and see Lord Erskine's Remarks in his speech on the Rights of Juries. Speeches, vol. i. 277.

certainly does, matters of fact with matters of law, which would be separated by the strict forms of pleading. Although matters of law and of fact are mixed together in the issue, yet they are immediately separated by the judge at the trial, who leaves to the jury to find merely on the facts, and a verdict under the judge's direction is found one way or the other, with leave to the parties to go before the court, in term time, on the point of law, if dissatisfied with the judge's opinion. A practised judge and counsel, I think, seize without difficulty the points of law arising in the most complex facts of a cause. The generality of the issue does not in practice, therefore, I believe, interfere with the cardinal principle of law, that judges judge of the law, and juries of the fact. Mr. Brougham appears to think, that perjury is occasioned and facilitated by the general shape of the issue. But I confess I am at a loss to see how this can be the case, except in as far as the present system probably produces more issues of fact and fewer issues of law on demurrer, and as, therefore, more witnesses are sworn, there must of course be somewhat more perjuries. But it must be remembered, that if a defendant has three different defences on which he means to rely, he can have the benefit of them as much without the general issue as with it, since by Lord Somers' act, 4 Ann, c. 16. s. 4 and 5, for the amendment of the law, he may plead several different pleas. Under either system, he would raise the same points

at the trial, and call the same witnesses—he might equally procure false witnesses to swear to a release or payment of the debt—and whether they were called on one general issue, or three separate issues, I confess would appear to me to make no difference as to facilities for perjury.

The saving of expense and delay by the plea of the general issue is considerable, and its convenience is shown by its being allowed by so many acts of parliament in particular cases—though in these cases plaintiffs ought often to have a general form of declaration prescribed. I admit that the system is not harmonious, that in actions on the special circumstances of the case, and in trover, many defences are given in evidence, which, in actions of trespass, must be pleaded specially. But do these anomalies, which are grown familiar in use, produce evil in practice? It is not to be supposed that the plaintiff is obliged to arm himself in every case on the general issue, against a defence of infancy, release, gaming, &c. merely because they *may* all be put in evidence under that plea. Fictitious defences are not, in fact, of such frequent occurrence—nor would a special plea enable the plaintiff to meet them. In the vast majority of cases, the defence intended is understood between the parties.

Mr. Brougham complains of mischiefs and inconsistency in the rules which allow several pleas, and these not always consistent with one another. The act which allowed this has on

this and other accounts been often considered of salutary effect. It appears reasonable, that if you do not allow the defendant one general plea (as is the case in most of those actions where several pleas are principally pleaded, debt on bonds, actions of covenant, &c.) which shall put in issue the whole facts of the plaintiff's claim, you should allow him (subject to some restrictions, I admit) to take issue on it piecemeal by different pleas. (Our system certainly also often allows him, I think unnecessarily, a complete general denial, *and* several specific defences). When a plaintiff comes into a court to make a charge or claim against another party, drawn up with deliberation, it is surely not only a rule of law, but of reason, that he should be prepared to make good his whole statement, and it would surely be a hardship on a defendant to oblige him to select some single point for denial, and to admit the rest of the claim; notwithstanding Lord Coke says, that a double pleader is like a champion in battle who uses two batons. That the pleas may be inconsistent with one another,—provided each is applied to meet some allegation of the plaintiff—appears to be not unreasonable, and sometimes necessary. Suppose the claim of the plaintiff to be false (which sometimes happens, and in no case till proof is there any presumption for the plaintiff), why is the defendant to be restricted from requiring full proof, by denying every allegation? What is not expressly denied in pleading, as in discussion, is taken for

granted. Why is the defendant to be driven by the law into admission of a single fact, resting on the unproved allegations of the plaintiff on the record? and yet, if he is not obliged to make such admission, he must necessarily plead several and sometimes inconsistent pleas. Take Mr. Brougham's instance of the action on the bond. Mr. B. thinks it a grievance that a party should plead, 1st, Non est factum; 2d, Solvit ad diem; 3d, Solvit post diem; 4th, Performance and a general release. Mr. B. also states a plea of *solvit ante diem*, but this plea is a proof of Mr. Brougham's research, for, though once rarely in use, I can find no trace of it within sixty-five years, and none whatever in Mr. Chitty's, Mr. Stephen's, or Mr. Archbold's Modern Treatises on Pleading. Now suppose, sir, an action brought on a bond paid off by defendant (which has not unfrequently occurred), why is not the defendant to defend himself by every kind of plea from such a fraud? If he pleads merely payment, he may not have a witness living or at hand, or a receipt in existence to prove his plea. Why is he to be deprived also of saving himself from an unjust claim by pleading *non est factum*, and thus obliging the plaintiff to prove the execution of the bond, in which he may possibly fail, or in doing which he may produce a witness useful to the defendant, who may perhaps show an admission by the plaintiff, of the receipt of the money, or other testimony favourable to the defendant? Why, again, may he not plead a release of the bond, on

which he may make use of the presumption of release arising from the bond being long unheard of, and not put in force? Surely, sir, it would be the height of injustice to exclude a defendant, in *many* cases, from all these defences; and yet, if one defendant may want them, it is difficult to forbid other defendants to resort to them—for the rule must be general. How is it to be known before the trial whether it is a fair or a fraudulent claim? In our care to expedite plaintiffs, we should not forget to secure defendants. By the Statute * of Lord Somers, which expressly enabled parties to plead more than one plea, the leave of the court is required, so that the court can control any improper use of the privilege. The permission is now a matter of course, though not so formerly. I confess I think, 1st, if it were made necessary to obtain a Rule Nisi before a single judge, it might in some degree prevent abuse; and 2dly, I think it should never be allowed to plead in *company with the general issue any specific defence which may be proved under it*, as infancy, release, &c. In these cases I would make the defendant take his choice, and he could not be prejudiced. The statute also provides, that a party pleading several pleas, and succeeding on only one, shall *have no costs* on the others, unless the judge certify that it was proper to plead them. 3dly, I think, sir, if this provision were extended, and the defendant in such were *obliged to pay costs* on the pleas on which he failed, un-

* 4 Ann. c. 16.

less the Judge certified, it might be a useful alteration. And 4thly, I would also suggest that this provision might be precisely applied to the various counts in the declaration, so that the Judge at the trial should in every case *certify exactly what counts were fair and necessary*, and on these alone costs should be taxed for the plaintiff. By these regulations I cannot help thinking that some of the incidental abuses arising from the system of several pleas and several counts would be removed, while the advantages of the practice would be retained. 5thly, I would also suggest that the plaintiff should be obliged to condense all the *common counts* in assumpsit into one, which would save length without any inconvenience.

Mr. Brougham wishes to allow a defendant one defence in point of *law*, and another in point of *fact* to the same pleading; and thinks it wrong that a party demurring to the plaintiff's law should be obliged to admit his facts, or *vice versâ*. Mr. Brougham will not allow a defendant to say to the plaintiff, "You tell me I owe you £1000 on a bond—show me first that I executed the bond; and then I will prove I paid it off:" (which, though apparently inconsistent, I think I have shown to be necessary) but he will allow him to assert, "The bond is bad in law—but if it is good in law, I say the execution is not my writing." I confess, sir, I agree with Mr. Brougham, and think that the defences in law and in fact are not inconsistent. They seem to me to be rational, (like several defences in *fact*)

on this ground—that the burthen of *proving his whole case* must in principle lay on the plaintiff.

But, sir, the defendant has now the advantage of a defence in law, and in fact; for if the plaintiff's bond be not valid in law, the defendant cannot be charged by it, though there be a verdict against him at the trial, since the bond being on the record, the court will *arrest the judgment* on the defendant's motion. While this can be done, I confess I do not see why a change should be made, to enable a party to demur and plead to the same declaration or count. Though on sound reasoning I confess it would appear to me not inconsistent, I believe it would be liable to much abuse, and tend to introduce delays and expenses, and long and subtle records and arguments.

The crown has now the power of taking issues both in law and in fact, and the length and intricacy to which records run in crown proceedings in the exchequer, is certainly no argument in favour of the alteration. At all events, I entirely concur with Mr. Brougham, that the crown and the subject should, on every account, be placed in this and in the other points alluded to, on an equal footing before the courts.

The above are the main objections made by Mr. Brougham to different parts of the pleading system. Looking at pleading as a whole (without reminding you that Sir William Jones considered it founded on "an exquisite logic," that Blackstone and Lord Mansfield highly applauded its rules), it is to be regarded as a con-

densed and technical mode of formal narration of the plaintiff's grounds of claim, and of the defendant's defence. Unlike the system of courts of equity, and that prevailing in most courts of Europe, where a judge and not a jury decides, and where the parties state their claims and defences, as it is called, "at large," the system of English pleading is directed to the object of developing by a close discussion (formally *oral* and now on record) the precise points in issue between the parties, conducted according to rules of logic, throwing off by logical admissions and concessions all extraneous matter, and proceeding to the *gist*, or point between the parties on which an issue is finally joined—either an issue of fact for a jury, or an issue of law for the court. In its principle and scheme, I humbly conceive a better, or neater, or more useful system, could not well be devised for juridical contentions. One of its main advantages over other systems is that it is adapted to the trial by jury, and leads to a precision and certainty as to the points at issue, which less technical and more copious modes of statement do not produce. That in many instances we depart, in some degree, from its precise rules, by admitting general pleading, there is no doubt; but in others, where strict points of law are to be presented to the judges alone, we adhere to them with advantage. Many forms of action now in use are remarkably simple and concise. The framers of them appear to have classed,

according to principle, the various wrongs and infringements of rights, which society most commonly presented. Thus the writ of trespass is for any *forcible* injury to the person, goods, or property. The writ of trover is for any *conversion* of another's goods and chattels not forcible (though in practice it has now become frequently concurrent with trespass). The writ of debt for a *specific sum* due. The writ of covenant for any breach of agreement *under seal.* The writ of replevin for any *taking of goods,* but principally seizures for *distresses.* As however cases arose of special and peculiar circumstances, not falling within any of those strict and technical actions, the statute 13 Edward I. c. 24, gives the writ *in consimili casu,* under which are framed the actions *on the case* now so frequent in practice, and of which the far most frequent action, assumpsit (on unsealed contracts), is a branch. The actions on contracts of all kinds have naturally in the present state of society become the most ordinary subjects before the courts, far out-numbering the trespasses, and forcible wrongs, and the actions as to real property, which before the extension of commerce, and the vast increase of personal property, were the main subjects of litigation. Contracts, it is obvious, are infinitely diversified, often complex, often ambiguous, often perplexed with details, often obscure from generality.

Hence the action of assumpsit has frequently become lengthy, and nice and subtle in its statements. I have stated before how this cause has introduced into this action, and the action *on the case*, a variety and length of counts, which do not belong to the other actions in the fixed forms of the register. To describe a mercantile contract, a policy of insurance, a charter-party with any accuracy obviously requires length. If the statement is general, it does not convey the particular information—"brevis esse laboro, obscurus fio"—if it is particular, the danger of variance from the proof is increased, especially in verbal contracts, and those resulting from various letters. In the early stages of pleading the forms were very short and simple. Special actions of assumpsit were then unknown, principally because commerce of all kinds was in infancy.

Lord Coke says, "that in the reigns of Edward II., Edward I., and upwards, the pleadings were plain and simple, nothing curious, evermore having chief respect to matter, not to form of words." In the reign of Henry IV. and Henry VII. Lord Hale * says they were much longer but still "far shorter than afterwards, especially after Henry VIII.," when he says, "the judges became somewhat too curious therein," and pleadings degenerated from their

* Hist. of Common Law, 172.

ancient simplicity into length, and repetitions, and trivial niceties. Lord Hale ascribes this in great degree to the change from oral to laboriously prepared and written pleadings. It seems also to have arisen from the growing variety of contracts, transfers, and modifications of property of all sorts. Sheppard *, an author quoted by Mr. Brougham, who lived in the *time of Charles the Second*, mentions that "long pleadings were worse in action of *covenants*, for breach of *covenants*, actions of case for nuisances, and in avowries" (for rent, and damage by cattle, in replevin), and complains that "for small defects in some circumstances in the declaration the defendant will demur to it, and put the plaintiff to begin all again;" and he suggests various "cures" for these evils. Sir, all Mr. Sheppard's "balmes" for the diseases of pleading have been administered by the courts and the legislature with salutary effect. In the case just mentioned, an *instant amendment* is now allowed by the courts of the defect pointed out by the demurrer; and by Lord Somers' Act the demurrer must *call attention* to the *precise defect* by specifying it, or the objection cannot be made. No objection of form can now be made after a verdict has settled the merits of the cause. No defective allegation in pleading can be taken advantage of after trial, if the fact

* Sheppard's English Balme, p. 73.

thus imperfectly stated is of that kind, that it must be presumed the jury were satisfied of its truth before they could find a verdict. No costs are allowed when a judgment is arrested after verdict, which can only be done for a substantial defect. The courts have interfered, and reprimanded counsel for unnecessary length and perplexity in their pleadings. The case of this sort mentioned by Mr. Brougham, is an instance *sixty-eight years ago*, in the first year of George III., where there were 27 special pleas of great length. The result shows the rarity of the practice, its obloquy even at that day, and the efficacy of the remedy the court can apply. "Robinson" (who was a party interested and also a barrister) "in propria personâ showed cause against this report, *no other counsel caring to be employed*, and insisted he had a right to do what he had done, and that he thought the whole declaration necessary. The court strongly *inclined to fix some heavy censure upon him*, but desired that previously the question of right might be tried; and it was recommended by the court to Sergeant Hewitt, exparte Robinson, and Mr. Winn for the *defendants, to settle an issue* for that purpose, which they *did the next day on a quarter of a sheet of paper*, and it went down to be tried on the Northern circuit *." I am not aware of

* Yates *v.* Carlisle, 1 Black. 270.

any cases in the books of this excess of abuse in modern days. Had they existed, Mr. Brougham would not have resorted to a case near three quarters of a century ago. Cases have occurred not unfrequently, where the court have struck out the redundancies of the pleader from the declaration, compelling the parties or the attorneys to pay the costs; and if parties applied, they could do it still more frequently. Except special cases of assumpsit, and actions for nuisances, pleadings in trespass to try rights, and one or two other instances, the great majority of modern actions are not remarkable for length or intricacy of pleading. Its forms might, however, I think, be still further shortened in some instances, especially by striking out a number of the common counts (as they are called) which are often inserted without reason, and by referring from one count or plea to another, more frequently than is now done, in order to save repetition. Viewed as a whole, without dwelling on or exaggerating isolated abuses, I believe there is not a part of the judicial system which creates less serious evil, while its advantages are many. Mr. Stephen, following Lord Mansfield, well remarks, "to combine with the requisite *certainty* and precision the greatest possible *brevity* is now justly considered as the perfection of pleading. This principle, however, has not been kept in view

uniformly at every era of the science. For, although it appears to have prevailed at the earliest periods, it seems to have been nearly forgotten during a subsequent interval of our legal history, and it *is to the wisdom of the modern judges that it owes its revival and restoration.*"

Another proposition of Mr. Brougham is to remove some existing varieties in the laws of property throughout the country. Mr. B. says, "Were it likely to be useful, or could it be necessary, that by crossing a river we should get to a place where the whole of a man's children equally inherited his estate? That, by going down a few miles to Brentford we should reach a locality, in which specific provision was made in favour of the youngest branch of a family," &c. &c. If, sir, the question now were to form a code *de novo*, for the rising republic of New Britain, I quite admit it would be well to consider whether it were useful or necessary to have one large county, and some towns, exceptions to the general law of primogeniture. But when from historical circumstances we find these customs rooted and fixed in certain parts of the kingdom, when not a whisper of complaint, or a case of grievance, (that I am aware of) is heard from the men of Kent, or of the burgesses of borough English boroughs, on the subject of the peculiar laws of

descent and customs there existing, surely, sir, the only question is, what prospect of practical good presents itself to afford a motive to the change. It is not with our gavel-kind in Kent as it is with partible inheritance in France, where the law is compulsory, since the people in general have no power of remedying it by entails, and only a partial one of interfering with it by testamentary disposition. In Kent, if the people do not like it, they modify its effects by will, or by settlements. Mr. Humphreys * says, speaking of the abolition, "The only *sensation* to be imagined is in Kent, but the sentiments of that county, and particularly of the greater land-owners in it, may be fairly inferred from the various disgavelling acts which from time to time have been passed." Sir, as far as the sentiments of the county can be gathered from their acts, they would appear to be in favour of the custom; for no disgavelling act has passed since the 21st James I., and only seven acts before that time, the first being in the 31st Hen. 8. c. 3.† I incline to believe, that the law, by the sufferance of the land-owners, has produced a greater subdivision of property in that county than elsewhere; and if I am not misinformed, the old attachment to this among the other Kentish customs still operates on many classes, and induces them to leave the estate to descend among the sons, according to

* Humphreys on Real Property, p. 26.

† Robinson on Gavel-kind, p. 94.

law. If six Kentish yeomen have any feeling of this kind, I confess I hold that feeling a better reason for retaining the law, than can be found for its abolition in the dry notion of uniformity. If this doctrine is acted upon, where is it to stop? Without alluding to more serious instances, we must take away a sheriff from the city of London, give a second member to Abingdon, and reduce all our counties, parishes, and hundreds to the parallelograms of Mr. Robert Owen.

Mr. Brougham asks whether it is right that in London there should be a law for recovering property by attachment different from that established in the rest of the country. Here again, I should take the liberty of saying, if it is shown that the law there really works mischief, that may form a ground for inquiry: but to my mind it seems no objection to it that it does not exist universally. I believe, sir, that the principle of the proceeding in London, that of a creditor obtaining payment out of his debtor's property in the hands of a third party, is a beneficial one, especially in commercial towns. Perhaps it might be well to extend it to other places. At all events, when we consider that the peculiar courts and customs of the City of London form a connected system of usages and privileges, confirmed by various charters, sanctioned by acts of parliament; many of them favourable to commerce, and some resting on the footing of consideration actually paid, surely weighty inconveniences should be shown to jus-

tify the legislature in interfering with any part of them, though not in uniformity with the systems of other cities or places. Not a corporation or city in the kingdom would be unaffected if strict uniformity were required in all judicial courts and processes. There are cases certainly in which the conflictions of usage in different parts of the country have been eminently mischievous, as in the instance of weights and measures; but here the practical mischief was the ground for the alteration. The multitude of *coutumes* and jurisdictions abolished in France were a positive obstruction to alienation and improvement of land, and a source of litigation and uncertainty, besides being oppressive in many instances.

Mr. Brougham also objects to copyhold tenures, in which a principal diversity of customs in the country exists. Mr. Brougham, I think, overstates the inconvenience of the difficulty of a party possessed of copyhold land borrowing money upon it. A mortgage of copyholds by surrender on condition, is I believe a security of frequent occurrence. Mr. Humphreys says, "the tenant may also mortgage by means of a conditional surrender, to be void on payment of the loan with interest *." Mr. Watkins † (a great authority on the subject) gives the forms of

* Humphreys, on the State of the English Laws of Real Property, 2d edition, p. 144.

† Watkins on Copyholds, 3d edit. vol. i. p. 184.

the surrender by way of mortgage, and the discharge on the money being paid off; and any one who reads these brief forms of about a dozen lines, and compares them with the verbose skins of parchment of a mortgage of freeholds, will perceive that the inferiority of copyholds certainly does not consist in the length, or complexity, or dearness of the instruments of mortgage or alienation. They are also mortgageable in equity (like freehold) by mere deposit of the copies of court roll *. The main real objections I apprehend, sir, to this tenure, are one mentioned by Mr. Brougham, viz., that copyholds are not extendible for the copyholder's debts on an elegit, like freeholds; and also another, that the interest of the copyholder is in some respects such as to discourage his improvement of the lands. Add to this, that though the mere documents of title are short and not expensive, the separate nature of the title creates expense and trouble in alienations of large estates of both freehold and copyhold land. The variety of the customs is also here an evil and a cause of expense—heriots are odious—fines are not in all cases fixed—and where it is necessary to bring actions in the Manor Court, great difficulties, and delays, and expenses occur, and what is more objectionable, the proceeding is often without appeal. A striking instance of this

* 19 Ves. Rep. 202.

sort, as to property of 10,000*l.* value, occurred lately to my knowledge. The decision was before the steward and his assessor. Mr. Brougham, I believe, and several other eminent advocates were employed, and from this unsatisfactory court, which sat at a tavern, the case could not be removed. The subject of copyholds seems to deserve investigation.

Mr. Brougham also proposes to introduce courts of arbitration (conciliation courts) from Denmark. He asks, "whether half the number of cases at present standing on the King's Bench paper would have appeared there, if the parties had the opportunity of going before a sensible arbitrator?" Why, surely, sir, every suitor in the King's Bench paper had, by our law, throughout the proceedings and till the trial, the opportunity of going before an arbitrator; that is, before a person selected by the parties to settle their differences. The law has in every way encouraged such a course, by making provisions, that wherever an arbitrator is named witnesses may be sworn, their reference may be made a rule of court, the award may be enforced by the orders and attachments of the court, it may be set aside by the courts if erroneous. Such references, I need not inform you, are of every day's occurrence both out of court and in court; and they,

doubtless, would be more frequent, were it not that suitors are, in fact, found to prefer in general a regular and authentic decision by judge and jury to domestic adjudications. When the award is made, it perpetually happens that the losing party harasses his opponent, by proceedings to set it aside for unfair conduct by the arbitrator, as being against law, or for want of proper notice of the meetings, or some other cause. And it is not unfrequently necessary to bring an action to enforce it; or if the arbitrator has done wrong, the award is set aside, and all the expense of the reference is thrown away. Nor does this appear to be owing to any vice in our system as to arbitrations, since such tribunals and their awards must necessarily be subject to the revision and control of the superior courts of the country. At the assizes and Nisi Prius sittings, it is with difficulty that the judge and counsel can persuade parties to refer the cause instead of trying it. I am aware, that this is in great degree owing to all the costs of the trial having been at that late stage, in fact, incurred. But still the causes above noticed will, I believe, always have much influence in disinclining parties to refer their disputes. Mr. B. would probably say the difficulty arises in agreeing on an arbitrator; but where there is a real desire to settle amicably, I believe this point is

not very often an insurmountable obstacle. I confess I can see no difference between the arbitrator fixed in an arbitration or conciliation court, and an arbitrator selected between the parties, which should incline the parties to prefer the former, who would not be of their own choosing. In cases of any difficulty, it would equally be necessary to have the assistance of counsel or attorneys at the arbitration, and then what is it but a trial before a court? It would seem to be impossible to render the award final any more than that of a chosen arbitrator, according to our plan, since a subordinate officer of this kind must necessarily be subject to the superintendence of the superior courts. To allow him to make unimpeachable awards, and order executions and levies, without any control of a higher court, would be vesting in such an arbitrator an authority not enjoyed by regular judges of inferior courts. To know to what extent, and for what reason, the plan succeeds in Denmark, we should know accurately the nature and constitution of the legal system, and of the courts in that country—since the institution must depend, for its beneficial influence, on its relations with the other institutions in conjunction with which it works. In Western Prussia this experiment has of late been tried under a decree of the king

commanding the inhabitants of every commune to elect a general arbitrator, not a lawyer, who is sworn into his office, and the inhabitants have the option of taking small disputes before him. If County Courts and Juries had been settled institutions in Prussia as they are here, probably the government would not have introduced this plan.

Mr. Brougham wishes to accomplish the object of bringing parties together before the commencement of a litigation. According to the laws of Bavaria, it is now compulsory on the plaintiff and defendant to meet, with their lawyers and witnesses, and endeavour to settle their differences before they can commence a suit. How the plan succeeds is hardly, I believe, yet known. Such a shaking of hands by compulsion would not seem very likely to heal breaches, and why the courts should be closed against two parties, *sui juris*, who choose, deliberately, and without any mischief to any third party, to settle their disputes *arbitrio judicis*, I do not very well see.

Mr. Brougham proposes to abolish the law of arrest for debt, in the commencement of a suit, or at least, only to allow of it in case of an intention of flight. He would "first prevent the debtor from wilfully absenting himself, and thereby causing delay:—secondly, to give the

debtor notice of the cause, that he might be able to defend himself if in the right, and to yield if in the wrong:—thirdly, to give him no unnecessary inconvenience till he be actually found indebted." No doubt, sir, to reconcile all these comforts to the debtor with all these securities to the creditor, is a most desirable object; but, as it so often happens, that debtors will not yield if in the wrong and will defend themselves though not in the right, it seems very difficult to provide for Mr. Brougham's various objects consistently with one another. That the security of the creditor is the primary object, there can be no doubt, and as long as many evasive debtors would run away at the sight of process, and as it is impossible beforehand to know the evasive from the honest debtor, there seems no other plan of securing the creditor, than to subject all debtors to one law.

Mr. Brougham complains, that "at present it is the custom to presume the debtor in the wrong;" but, surely this is not an unfair presumption, and the best proof of it is, that according to the returns of the trials in London and Middlesex and of the verdicts, it appears, that for any verdict found for a defendant, there are at least twenty-five found for the plaintiff. A man will defend a cause and delay payment of his liabilities, though without reasonable chance of success, but he will not so easily put

himself in motion to commence a law-suit. If we took those cases alone where the action is for a debt sworn to by the plaintiff, I should think the verdicts for the plaintiff would be as thirty or forty to one for the defendant. There are occasional cases of abuse of the right of arrest, undoubtedly, but the oath of the plaintiff is surely a considerable security. And the evil which Mr. Brougham would avoid, of exposing respectable and solvent individuals to this rigour, is in practice very much effected under the present system, by the attorney and the sheriff's officer taking a bail bond, without any actual arrest or imprisonment taking place. The shock to dealings on credit in trade which an abolition of arrest must occasion, would be very considerable, and though the too unlimited credit now given by tradesmen is an evil, a sudden change of system, surely, could not be desirable.

I must beg you, sir, to overlook the haste with which these remarks have been necessarily thrown together. I regret that I cannot notice other points. I trust that no expression has escaped me wanting in becoming respect to any individual. I could have wished that the occasion and leisure from other pursuits had left me time to make this letter more worthy of your perusal. The motive of contributing, however humbly, at once to preserve

and improve some of our legal systems (by which alone I have been influenced to address you) may, in your mind, excuse the feebleness of these observations.

I have the honour to remain,
with the truest respect,
Sir,
your most obedient humble servant,
C. E. DODD.

5, *King's Bench Walk, Temple.*
20th February, 1828.

This statement should have appeared at p. 13, 14.

Causes tried in the King's Bench at Nisi Prius, in London and Middlesex, before Lord Tenterden, C. J.

A. D.	
* 1825	1048.
1826	1554.
1827	1356.

Average for the three years, 1319.

* The Act 6 Geo. IV. c. 96, requiring bail in all cases on Writs of Error, came into operation on 5th July, 1825.

THE END.

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